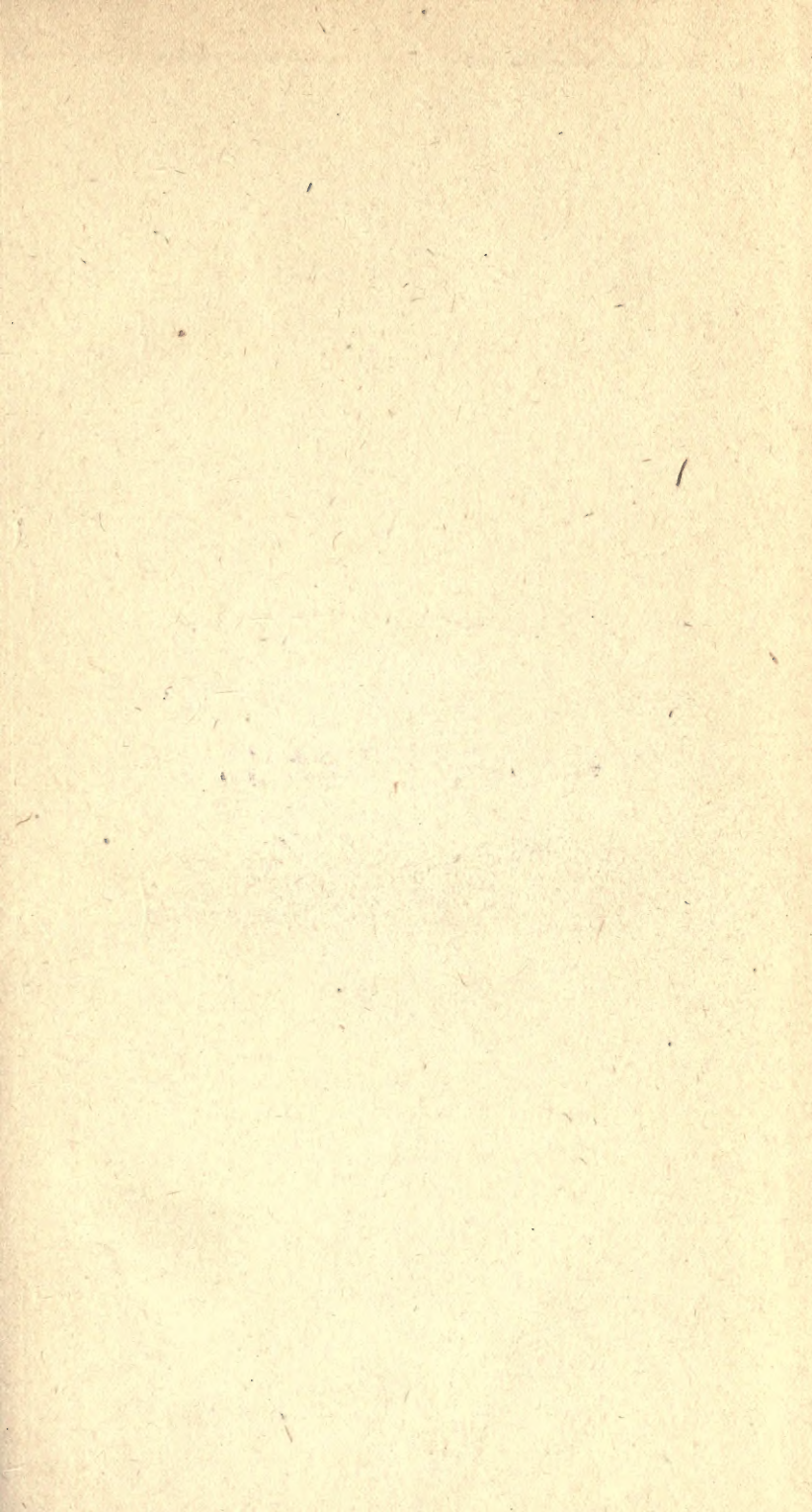




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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

BY RICHARD W. GILL, *Attorney at Law,*

AND

JOHN JOHNSON, *Clerk of the Court of Appeals.*

VOL. VI.

CONTAINING CASES IN 1833-34.

MERRICK & ALLEN

BALTIMORE:
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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge, resigned 6th June, 1834.
Hon. WILLIAM BOND MARTIN, do
Hon. JOHN STEPHEN, do
Hon. STEVENSON ARCHER, do
Hon. THOMAS BEALE DORSEY, do
Hon. E. F. CHAMBERS, do appointed 7th August, 1834.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's Counties.*

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, do

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Ann's and Talbot Counties.*

Hon. E. F. CHAMBERS, Chief Judge, *vice* Hon. Richard T. Earle, resigned.
Hon. JOHN B. ECCLESTON, Associate Judge.
Hon. PHILEMON B. HOPPER, do

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel and Montgomery Counties.*

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, do

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM BOND MARTIN, Chief Judge.
Hon. ARA SPENCE, Associate Judge.
Hon. WILLIAM TINGLE, do

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

Hon. JOHN BUCHANAN, Chief Judge.
Hon. ABRAHAM SHRIVER, Associate Judge.
Hon. THOMAS BUCHANAN, do

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*


Hon. STEVENSON ARCHER, Chief Judge.
Hon. RICHARD B. MAGRUDER, Associate Judge.
Hon. JOHN PURVIANCE, do

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. ALEXANDER NISBET, Associate Judge.
Hon. W. G. D. WORTHINGTON, do

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire.



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NAMES OF THE CASES

REPORTED IN THIS VOLUME.

Albers, S. G. <i>vs.</i> George Wilkinson, - - - - -	358
Baltzell and Davidson, G'ee of McCaffry and J. S. and J. Wever, -	335
Bank of Maryland <i>vs.</i> The State, - - - - -	205
Benton, V. J. and C. Goodhand, - - - - -	481
Bentley, C. <i>vs.</i> J. G. Cowman, <i>et al.</i> - - - - -	152
Berry, Z. and T. B. Crawford, - - - - -	63
Biscoe, Thomas K. <i>vs.</i> L. Biscoe, - - - - -	232
Biscoe, Langley, and T. K. Biscoe, - - - - -	232
Blizzard and Jacobs and Trumbo, Ex'r of Neff, - - - - -	18
Bruce, T. and J. Jamieson, - - - - -	72
Bruce and Fisher <i>vs.</i> Cook, G'ee of Scarborough, - - - - -	345
Burke, John M. <i>vs.</i> Negro Joe, - - - - -	136
Byers, John <i>vs.</i> J. McLanahan, Jr. - - - - -	250
Callis, H. A. <i>vs.</i> F. Tolson's Ex'rs, - - - - -	80
Campbell and Voss <i>vs.</i> Poultney, Ellicott, & Co. - - - - -	94
Carr, Ann <i>vs.</i> S. J. Gott and J. T. Wilson, - - - - -	309
Chambers, E. F. and Reed's Heirs and Administrators, - - - - -	490
Clarke and Wife, Adm'rs of Underwood, <i>vs.</i> State use of Williams' Ex'r, -	288
Cook, G'ee of Scarborough and Bruce and Fisher, - - - - -	345
Collinson, John <i>vs.</i> Thomas Owens, <i>et al.</i> - - - - -	4
Cowman, J. G. <i>et al.</i> and C. Bentley, - - - - -	152
Cox, Rachel, <i>et al.</i> <i>vs.</i> McCausland's Ad'mrs, - - - - -	16
Crawford and Sellman <i>vs.</i> R. Taylor, Trustee of Ford, - - - - -	323
Crawford, T. B. <i>vs.</i> Z. Berry, - - - - -	63
Cromwell and Hoffman, Adm'rs of Owings, - - - - -	144
Dennison, E. <i>vs.</i> P. H. Lee and Wife, - - - - -	383
Doogan, T. T. M. <i>vs.</i> J. S. Tyson, <i>et al.</i> - - - - -	453
Dorsey <i>vs.</i> Dorsey, <i>et al.</i> - - - - -	12
Dorsey, <i>et al.</i> and Dorsey, - - - - -	12
Dougherty P. <i>vs.</i> B. McColgan, - - - - -	275
Dulany and Wife and Dangerfield's Lessee <i>vs.</i> Tilghman, - - - - -	461
Duvall, C. and N. J. Waters, - - - - -	76
Ellicott, E. T. and A. <i>vs.</i> T. Ellicott, - - - - -	35
Ellicott, T. and E. T. and A. Ellicott, - - - - -	35

Ellicott, Morris <i>and</i> Gill <i>and</i> Union Bank of Tenn.	- - - -	363
Estep <i>and</i> Hall's Lessee <i>vs.</i> William Weems,	- - - -	303
Evans, Joseph, <i>et al.</i> <i>vs.</i> Richard Iglehart, Jr. <i>et al.</i>	- - - -	171
Feinour, C. <i>and</i> C. Salmon,	- - - -	60
Frederick County Bank <i>and</i> L. Griffith,	- - - -	424
Goodhand, C. <i>vs.</i> V. Benton, Jr.	- - - -	481
Gott, Susanna J. <i>and</i> J. F. Wilson <i>vs.</i> Ann Carr,	- - - -	309
Griffith, Lyde <i>vs.</i> The Frederick County Bank,	- - - -	424
Guyer, John <i>vs.</i> Maynard, Ex'r of Neth,	- - - -	420
Hall, John <i>vs.</i> J. H. Maccubbin,	- - - -	107
Hall, E. A. <i>vs.</i> T. L. Hall, <i>et al.</i>	- - - -	386
Hall, T. L. <i>et al.</i> <i>and</i> E. A. Hall,	- - - -	386
Hammond, P. Ex'rs <i>vs.</i> State use of Barber,	- - - -	157
Harris, Ann <i>vs.</i> Mary J. Harris, <i>et al.</i>	- - - -	111
Harris, Mary J. <i>and</i> Ann Harris,	- - - -	111
Hatton, H. D. <i>vs.</i> W. H. Lyles,	- - - -	122
Hoblitzell's Adm'rs <i>vs.</i> Lewis use of Ringgold,	- - - -	259
Hoffman, Adm'r of Owings <i>vs.</i> Cromwell,	- - - -	144
Hungerford, T. B. <i>and</i> Steam Navigation Company,	- - - -	291
Iglehart, M. <i>and</i> R. Ridgely,	- - - -	49
Iglehart, R. <i>and</i> Joseph Evans, <i>et al.</i>	- - - -	171
Jamieson, John <i>vs.</i> T. Bruce,	- - - -	72
Joe, Negro <i>and</i> J. M. Burke,	- - - -	136
Joice <i>and</i> Wife <i>vs.</i> E. Taylor,	- - - -	54
Jordan, Samuel <i>vs.</i> G. Trumbo,	- - - -	103
Kent's Adm'rs <i>and</i> Boyle <i>vs.</i> E. Taneyhill,	- - - -	1
Kilgour, John <i>vs.</i> Miles <i>and</i> Goldsmith,	- - - -	268
Lee, E. <i>vs.</i> S. Lee <i>and</i> R. Welch, of Ben.	- - - -	316
Lee, S. <i>and</i> R. Welch, of Ben. <i>and</i> E. Lee,	- - - -	316
Lee, P. H. <i>and</i> Wife <i>vs.</i> E. Dennison,	- - - -	383
Lee, A. <i>vs.</i> George Peter,	- - - -	447
Lewis, use of Ringgold <i>vs.</i> Hoblitzell's Adm'rs,	- - - -	259
Lyles, W. H. <i>vs.</i> Henry D. Hatton,	- - - -	122
Maynard, Ex'r of Neth <i>vs.</i> John Guyer,	- - - -	420
McCausland's Adm'r <i>and</i> Rachel Cox,	- - - -	16
McClanahan, J. Jr. <i>vs.</i> Byers, J.	- - - -	250
McColgan, B. <i>and</i> P. Dougherty,	- - - -	275
McCubbin, J. H. <i>and</i> John Hall,	- - - -	107
Miles <i>and</i> Goldsmith <i>vs.</i> Kilgour,	- - - -	268
O'Neal, W. <i>and</i> M. Ranahan,	- - - -	298
Owens, Thomas, <i>et al.</i> <i>and</i> John Collinson,	- - - -	4
Patterson, John <i>vs.</i> J. C. Wilson,	- - - -	499
Penn. Del. <i>and</i> M'd Steam Navigation Company <i>vs.</i> T. B. Hungerford,	- - - -	291
Peter, George <i>and</i> A. Lee,	- - - -	447
Plater, George <i>vs.</i> Wm. B. Scott,	- - - -	116

CONTENTS.

vii

Poultney, Ellicott, & Co. <i>and</i> Campbell and Voss,	- - - -	94
Pratt, E. A. <i>vs.</i> W. Vanwyck's Ex'rs,	- - - -	495
Ranahan, M. <i>vs.</i> W. O'Neale,	- - - -	298
Ridgely, Robert <i>vs.</i> Iglehart, M.	- - - -	49
Rigden, J. E. <i>vs.</i> C. Wolcott,	- - - -	413
Robins, J. P. <i>and</i> Ara Spence,	- - - -	
Salmon, Charles <i>vs.</i> C. Feinour,	- - - -	60
Sasscer, J. <i>vs.</i> James Young <i>and</i> J. Kemp,	- - - -	243
Scott, W. B. <i>and</i> G. Plater,	- - - -	116
Spence, Ara <i>vs.</i> J. P. Robins,	- - - -	
State use of Barber <i>vs.</i> Hammond's Ex'rs,	- - - -	157
State <i>vs.</i> Bank of Maryland,	- - - -	205
State use of Williams' Ex'r <i>and</i> Clark <i>and</i> Wife, Adm'rs of Underwood,		288
Taneyhill, E. <i>and</i> Kent's Adm'rs <i>and</i> Boyle,	- - - -	1
Taylor, E. <i>and</i> Joice <i>and</i> Wife,	- - - -	54
Taylor, R., Trustee of Ford <i>and</i> Crawford <i>and</i> Sellman,	- - - -	323
Thomas', D. L. Adm'rs <i>vs.</i> B. J. Vonkappf,	- - - -	372
Thompson, R. <i>and</i> Francis A. Ward <i>and</i> Wife,	- - - -	349
Tilghman <i>and</i> Dulany <i>and</i> Wife <i>and</i> Dangerfield,	- - - -	461
Tolson, F. Ex'r <i>and</i> Callis, H. A.	- - - -	80
Trumbo, Ex'r of Neff <i>vs.</i> Blizzard <i>and</i> Jacobs,	- - - -	18
Trumbo, G. <i>and</i> S. Jordan,	- - - -	103
Tyson, J. S. <i>and</i> T. T. M. Doogan,	- - - -	453
Union Bank of Tenn. <i>vs.</i> Ellicott, Morris and Gill,	- - - -	363
Vanwyck's, W. Ex'rs <i>and</i> E. A. Pratt,	- - - -	495
Vonkappf, B. J. <i>and</i> D. L. Thomas' Adm'rs,	- - - -	372
Ward, F. A. <i>et ux.</i> <i>vs.</i> Robert Thompson,	- - - -	349
Waters, N. J. <i>vs.</i> Chas. Duvall,	- - - -	76
Weems, Wm. <i>and</i> Estep <i>and</i> Hall's Lessee,	- - - -	303
Wever, J. S. <i>and</i> J. <i>vs.</i> Baltzell <i>and</i> Davidson, G'ee of McCaffry,	- - - -	335
Wilkinson, G. <i>and</i> S. G. Albers,	- - - -	358
Wilson, J. C. <i>and</i> J. Patterson,	- - - -	499
Wolcott, C. <i>and</i> J. E. Rigden,	- - - -	413
Young, James, <i>and</i> Kemp <i>and</i> Z. Sasscer,	- - - -	243

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

DECEMBER TERM, 1833.

KENT'S Adm'rs AND BOYLE vs. ELIZABETH TANEYHILL,
et al.—December, 1833.

Regularly an infant's answer by his guardian is not evidence against him, because he is not sworn; and it is only for the purpose of making proper parties. It is not in reality the answer of the infant, but of the guardian only, who is sworn.

Where an infant is defendant, and it is not expressly provided by law, that his answer by guardian shall be considered an admission of the facts alleged in the bill, it is proper to put the plaintiff to proof of all his material allegations.

Under the act of 1832, ch. 302, sec. 6, where the appellate court perceives, that the substantial merits of the cause would not be determined either by affirming or reversing the Chancellor's decree, but that the purposes of justice would be advanced by further proceedings being had, the cause must be remanded to the Court of Chancery.

APPEAL from Chancery.

The bill in this case was filed by the appellants on the 2d of April, 1832; and the judge, by whom the opinion of this court was delivered, has fully stated all the circumstances.

Boyle, for the appellants, submitted the record to the court without argument.

Kent's Adm'rs and Boyle vs. Elizabeth Taneyhill, et al.—1833.

BUCHANAN, Ch. J., delivered the opinion of the court.

It is alleged in the bill that *Samuel Taneyhill* became the purchaser of certain lands, decreed to be sold on a bill for that purpose, filed in the Court of Chancery by *Daniel Kent*, against *Elizabeth Taneyhill*, *James Taneyhill*, and *Samuel Taneyhill*. That the sale was ratified by the Chancellor. That *Daniel Kent* was appointed the trustee for the sale of the lands, and died without having completed the trust. That *Samuel Taneyhill*, the purchaser, paid a part of the purchase money, \$100, to *Daniel Kent* the trustee, and \$20 to the complainants, *James Kent* and *Daniel Kent*, his administrators; and died intestate without personal property, leaving a widow, *Elizabeth Taneyhill*, and *James Taneyhill* and *Samuel Taneyhill*, infants, his heirs at law, without having given bond for the residue of the purchase money, the amount of which is not stated. That *James Boyle*, one of the complainants, was appointed trustee to complete the trust, and that letters of administration were granted to *Daniel Kent* and *James Kent*, the other complainants, on the personal estate of *Daniel Kent*, the former trustee; and the bill is for a sale of the same lands, for the payment of the balance of the purchase money.

Elizabeth Taneyhill, the widow of *Samuel Taneyhill* the purchaser, in her answer, and *James Taneyhill* and *Samuel Taneyhill*, his infant heirs, by their guardian, in their answer admit the allegations of the bill, and that they are willing the lands should be sold.

The bill was dismissed by the Chancellor, and the cause coming up by appeal from the Chancellor's decree, is submitted to this court without argument.

The bill is untechnically drawn. There is no regular reference to the proceedings in the cause in which the lands in question are alleged to have been decreed to be sold; nor is it any where stated, for what amount they were sold by *Daniel Kent* the deceased trustee; but a general allegation only, that the balance of the purchase money remains

Kent's Adm'rs and Boyle vs. Elizabeth Taneyhill, *et al.*—1833.

unpaid, for the payment of which the same lands are now again sought to be sold by the appellants, two of whom are styled administrators of the personal estate of the former trustee; and the other stated to be a trustee appointed by the Chancellor to complete the trust, with no testimony whatever on the part of the appellants to sustain a single allegation in the bill; which is said to be supplied according to the practice of the chancery court, by the answer of the widow of *Samuel Taneyhill* the alleged purchaser, and of the infant heirs at law by their guardian, admitting the facts stated in the bill to be true. Regularly an infant's answer by his guardian is not evidence against him, because he is not sworn, and it is only for the purpose of making proper parties. It is not in reality the answer of the infant, but of the guardian only who is sworn; and there is great danger to the interests of an infant, in permitting such an answer to be read against him, who from his tender years, may know nothing of the contents of the answer put in for him by his guardian, or not be able to judge of it, or of its effect. And the guardian *ad litem* is so appointed, as often to know nothing of the matter himself; and too much caution cannot well be observed, in guarding the rights of infants, not only against the improvident answers of honest guardians, but against the answers of such as may have sinister views; to say nothing of how far an infant may ordinarily be bound by a decree, upon an answer by his guardian, admitting the facts of the bill.

The better and safer course, therefore, for all concerned, is in every case, in which an infant is a defendant, answering by his guardian, to put the plaintiff upon the proof of the material allegations in his bill, in the same manner, as if nothing had been admitted by the answer, unless otherwise expressly provided by law. It is the proper course, and that which prevails elsewhere.

The bill of complaint in this case is certainly defective, in the omission to set out the amount for which the lands were sold, and of the balance still unpaid; but it is stated

Collinson vs. Owens, *et al.*—1833.

that *Samuel Taneyhill* the purchaser, never bonded for the purchase money; and if the allegations in the bill are true, the amount remaining unpaid is an equitable lien upon the lands, for the payment of which they are subject to be sold, under proper proceedings for that purpose.

It appearing therefore to this court, that the substantial merits of the cause would not be determined by either reversing or affirming the decree; but that the purposes of justice would be advanced by further proceedings being had in the Court of Chancery, the cause must be remanded to that court, under the provisions of the act of 1832, *ch.* 302, *sec.* 6.

REMANDED TO COURT OF CHANCERY FOR FURTHER PROCEEDINGS.

JOHN COLLINSON vs. THOMAS OWENS, *et al.*—December, 1833.

Where an executor or administrator pays to creditors a greater amount of assets than he has received, and the personal estate of the deceased is insufficient to pay his debts, he may be substituted in equity to the rights of the creditors so overpaid, and may proceed against the real assets of the deceased, upon the same terms, conditions and proof, and subject to the same defences, as the creditors themselves if unpaid might have proceeded upon and been bound by.

An admission of a debt by an executor, even a judgment against him, is no evidence against the heir to take the case out of the act of limitations.

The heir has the same uncontrolled discretion in resisting the payment of claims advanced against the realty, that the executor or administrator has in regard to the personalty.

Estoppels are not favored in equity.

A decree to sell real estate, and distribute the proceeds among the heirs of a deceased person, is no bar to a claim of a creditor of the deceased, seeking to enforce payment of his claim out of the real assets or their proceeds. The rights of the creditor were not in issue, considered or decided, by the decree for sale and distribution.

Collinson vs. Owens, et al.—1833.

The mere loan of money to a deceased party in his life-time, for the purpose of purchasing land with, does not of itself create a lien on the land for its repayment; and consequently cannot be relied upon as evidence to rebut the plea of limitations insisted upon by the heir of the debtor, in defending his real estate from a claim of the lender.

APPEAL from the Court of Chancery.

The original bill in this case was filed by the appellant on the 22d of August, 1828, and was afterwards amended by making additional parties.

It alleged that *Edward Collinson*, the brother of the complainant, died intestate, and without issue, some time in March, 1823, leaving the complainant, and the appellees and others, his heirs at law. That letters of administration on his personal estate were committed to the complainant, who overpaid the personal estate the sum of \$3,958 91, as appears by an account passed by the Orphans Court in February, 1825. That besides this overpayment, there were due the complainant himself, from his intestate, various other sums of money, some of which it was alleged constituted liens on his real estate, which before then had been sold (upon the application of the complainant and others,) by a decree of the court, dated August 18th, 1824, for distribution among his heirs, and that a portion of the proceeds thereof, due the appellees, remained then in the court of chancery. That the other heirs at law had contributed, out of their proportions of the proceeds of said real estate, the proportions due from them respectively on account thereof to the complainant; and the object of the bill was to apply the fund now in court belonging to the appellee, *Thomas Owens*, in the same way; upon the ground as regarded the debts that had been paid, that the complainant had a right to be substituted for such of the creditors of the intestate, as he had paid more than their proportions of the personal estate.

Vouchers and proofs of the various claims asserted by the complainant were exhibited, and among others, claims numbered 19 and 20, the former founded on a sealed con-

Collinson vs Owens, et al.—1833.

tract in relation to the division of certain real estate, dated in March, 1823; the latter being an open account for cash lent in January, 1813, which it was alleged and proved, was laid out in the purchase of the real estate, the proceeds of which it was the object of the bill to affect, and for that reason was supposed to constitute a lien thereon.

The answer of *Thomas Owens* relied upon the decree for the sale of the real estate of *Edward Collinson*, for distribution among his heirs, as a bar to the relief asked for by the present bill. It also charged, that the accounts passed by the complainant with the Orphans Court were false, and fraudulent in many particulars, and he relied on the act of limitations, and the staleness of the demands, and no every other circumstance that could constitute a defence to the present bill. The answers of the other defendants are not considered material.

Bland, Chancellor, on the 10th of October, 1832, dismissed the bill with costs. And the case was thereupon brought by the complainant to this court.

It was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Brewer, for the appellant, contended,

1. That the accounts passed in the Orphans Court are *prima facie* evidence, that the personal estate has been exhausted in the payment of debts, so as to enable the complainant to come upon the real assets, for the payment of such part of his claims as the personal estate is insufficient to pay, provided he establish those claims by evidence other than the accounts, and that they are established by other evidence. *Gist's Admr's vs. Cockey and Fendall*, 7 Harr. and Johns. 139.

2. That the decree of 18th August, 1824, for the sale of *Edward Collinson's* real estate, and the subsequent proceedings constitutes no bar to relief in this suit. The

Collinson vs. Owens, at al.—1833.

points of controversy in this case were not involved in the former cause. They were not, and could not have been put in issue then, and consequently the decree cannot be a bar to the relief now sought. 2 *Mad. Ch. Pr.* 241, 249. 1 *Stark. Ev.* 198, 202, 207. In the former case, the complainant appeared as heir at law, he now appears as a creditor.

3. The statute of limitations constitutes no bar to the claims of the complainant, and more especially those numbered 19 and 20. *Sugden's Vend.* 549, 550. *Ghiselen and Worthington vs. Fergusson*, 4 *Harr. and Johns.* 524.

4. That the personal estate for the purposes of this suit should be appropriated first, to the discharge of the claims of others, actually paid by the administrator, and then to the discharge of his own claims. When one creditor has a lien and another has not, the creditor not having a lien, can compel him who has, to resort to his lien, in order that the general creditor may be paid out of the other assets of the debtor. *Field vs. Holland*, 6 *Cranch.* 8. *Ib.* 27.

5. That so much of the personal estate as is appropriated to the discharge of the complainant's claims, should under the circumstances of this case, be first applied to the discharge of such of them, (if there be any) as would be barred in this suit by the statute of limitations.

6. That if the decree of 18th August, 1824, is not a bar, the complainant is, in any event, entitled to a portion of his claim No. 19, and consequently, the decree of the chancellor dismissing the bill must be erroneous.

Alexander for the appellees.

1. The decree in the former case, is a bar to the relief prayed here. No relief can be had in this case inconsistent with the decree, and proceedings in that case. There is no allegation in the present bill, that the complainant did not know the condition of the estate at the time the first bill was filed. The relief prayed in the two cases is inconsistent. The first bill was for a partition of the land, and

Collinson vs. Owens, *et al.*—1833.

another partition could not now be decreed, and if so, how can another partition of the money, the representative of the land, be decreed. *Mitf.* 195. *Tourton vs. Flower*, 3 *Pr. Wms.* 371. A decree or judgment in *rem* is conclusive, not only as to the points decided, but as to the right of the thing itself, and the same subject cannot afterwards be litigated. *Charlotte Hall School vs. Greenwell*, 4 *Gill and Johns.* 407. *Ib.* 414. *Geffard vs. Hart*, 1 *Sch. and Lef.* 408. 3 *Atk.* 326. *Ib.* 809. 2 *Atk.* 348.

2. If, however, the decree is not a bar, still the complainant is not entitled to relief upon his present bill. The personal estate in the hands of the administrator, is to be applied rateably to all the claims, including those due the administrator himself, and he has no right to say which of his claims shall be paid out of the personal estate. 1798, *ch.* 101, *sub-ch.* 8, *sec.* 17, 19. If the administrator is at liberty to pay fully out of the personal estate, claims that could not be established, as against the realty, so as to leave wholly unpaid those which are a charge on the realty, great injustice might be done the heir. It would be giving the administrator the administration of both real and personal estate. The rule applicable to the case of two creditors, the one having two funds, and the other but one, does not apply here, because here all the creditors have the same right to resort to both funds. They are accessible alike to all.

3. The plea of limitations is a bar to each and all of the claims. For the advance of money in 1813, it is very clear, the personal responsibility of *Edward* alone was relied on, and that a landed security was not at the time thought of.

DORSEY, J., delivered the opinion of the court.

The important question presented for our determination in this case, is, whether an administrator, on an estate inadequate to the payment of the debts of the deceased, after having paid all such debts, is, in a court of equity, entitled to a reimbursement of the amount by him overpaid, out of

the deceased's real estate upon the production of his accounts passed with the Orphans Court, and the vouchers upon which they are founded, and establishing by legal testimony independently of the action of the Orphans Court upon the subject, an amount of such vouchers or debts, equal to the sum overpaid the personal estate? Or in other words, can an administrator, thus circumstanced, seek reimbursement from the real assets, upon any other principle than that of being subrogated to the rights of *all* the creditors by him paid off?

The attempt now made, if sustained, is in effect to give to the administrator the power to administer the real as well as personal assets. It strips the heir of his inherent hereditary rights, and vests them in the administrator. Such a doctrine is at war with the spirit of all the decisions of this court upon analagous subjects. We have determined that the admission of a debt by an executor or administrator, even a judgment against him, is no evidence against the heir, to take a claim out of the statute of limitations—wherefore then, shall the unauthorized acts of the administrator be permitted to have that effect? His duty is prescribed by our testamentary system; he is to distribute the personal effects of the deceased rateably amongst his creditors. If disregarding his liabilities, he has satisfied debts which he was under no obligation to pay; the consequences of his acts should be visited on himself, not on the appellees: their legal right should not be impaired thereby. All that in equity and conscience he could ask, is, that he should be substituted to the rights of the creditors overpaid. With this he is not satisfied; but calls on a court of equity, by an evasion of the mandates of the testamentary system, an indirect kind of transmutation of payments, to invest him with rights not possessed by those with whose attributes he is clothed, to grant to him a substitution against the realty not merely to the amount of his over payment to any individual creditor, but to the whole amount paid such creditor; although more than two-thirds of such payments were made

with the personal assets. The object and effect of which would be to deny to the heir the privilege of defending his inheritance against illegal and unjust claims against it; and to vest that authority in the executor or administrator. Such a proceeding cannot be tolerated. The heir has the same uncontrolled discretion in resisting the payment of claims advanced against the realty, that the executor or administrator has in regard to the personalty; and by no act, device or contrivance of the administrator or executor, can his power to do so, be abridged. Sanction the principle now insisted on, and all claims passed by the Orphans Court and paid by the administrator, though barred by the statute of limitations, or liable to be defeated upon their merits, by proof within the knowledge and reach of the heir, provided there be claims of an equal amount against which the heir can offer no defence, may be fixed by the executor or administrator upon the real estate, without leaving to the heir any possibility of defending himself against them. For example: if the realty be worth \$10,000, the personalty \$10,000, and the debts defeasible as aforesaid amount to \$10,000, and the debts indefeasible to the like sum, by the management of the executor or administrator in applying the entire personal assets in payment of the defeasible debts, the whole of the real estate is consumed by the indefeasible debts, and the heir is left penniless; whereas, had the personalty been appropriated as the law directs, one half of the realty would have been preserved to the heir.

The only correct disposition that could be made of the personal assets, is to apply them to the payment of all the debts of the deceased in due proportions. As respects the balances due such creditors, which have been paid by the administrator, he must establish and proceed to recover them out of the realty, by the same course of proceedings that such creditors, if unpaid, would have been bound to resort to.

We cannot regard the decree for the sale and distribution of the real estate of *Edward Collinson*, relied on in the answer as a bar to the relief sought by the complainant, as furnishing the slightest obstacle to his recovery. Estoppels

are not favored, but are odious in the eye of a court of equity. None of the rights or matters in controversy in this cause, were at issue, considered, or decided by the chancellor, in the case referred to. The only question there adjudicated, other than the sale of *Edward Collinson's* real estate, was the distributive proportion, as respected each other, to which his several heirs were respectively entitled. Whether the personal estate was insolvent, or to what amount the real estate was answerable to creditors, were questions not presented by the record, nor examined by the chancellor.

The only use that could be made of the proceedings in that case, against the complainant here, would be, that they were evidence of the injustice and fraudulent fabrication of his claims, as from their amount, he must have known of the insolvency of the personal estate; and would consequently, have proceeded for a sale of the real estate, to pay the debts of the deceased, rather than for its distribution amongst his heirs. But for this purpose they cannot avail the appellees; as from the record in this case it does not satisfactorily appear, that at the time of said proceedings and decree for the sale of the real estate, the insolvency of the personal fund was apparent to the appellant.

Claim No. 20 is not relieved from the bar to its recovery, which the plea of limitations presents by the proof offered as to its being a loan from *John* to *Edward Collinson* for the purpose of purchasing land, and therefore, as is insisted, a lien thereon. There is nothing in the transaction from which such an equity could arise. *John Collinson* does not appear to have looked to the land, as a security for his debt, either at the time of the loan or at any subsequent period. When the money was advanced, the agreement was that *Edward* should give his note for the amount. The only security demanded, or to have been given, was the personal responsibility of *Edward*. That such was subsequently the understanding of the brothers, is manifest from the settlement between them in 1823, where this loan was simply made an item in an open account; and where *John*

Dorsey vs. Dorsey, et al.—1833.

agrees, that *Edward* should have the land on which the alleged lien is alleged to be, at so much per acre ; to be paid for in a manner distinctly stipulated, yet not an intimation is given of the lien in question. Such an omission cannot be accounted for, had the lien existed in the contemplation of the parties.

Although we cannot grant relief to the complainant to the extent of his pretensions, we cannot sustain the decree of the Chancery Court dismissing his bill. He unquestionably was entitled to some relief. Claim No. 19 relative to the division of the land, being in our opinion sufficiently supported by proof, the balance due thereon, after the moiety of *Rezin Estep's* bond, and its distributive proportion of the personal estate are deducted therefrom, stands unaffected by the plea of limitations, and should be paid out of the proceeds of the real estate of *Edward Collinson* ; and one fifth part thereof must be drawn from the share received or to be received by *Thomas Owings*.

As soon as the necessary audit is made, this court will pass a decree reversing the decree of the Chancery Court, and giving to the appellant that relief to which, from our views expressed in the foregoing opinion, he appears to be entitled.

DECREE REVERSED.

DORSEY vs. DORSEY, et al.—December, 1833.

In equity the act of limitations may be taken advantage of, where the defendant alleges that he relies upon, and pleads in bar a certain act of the General Assembly made at a session, &c. entitled "an act for limitation of certain actions," &c. and prays to have the full benefit of the same at the hearing.

APPEAL from the Court of Chancery.

The object of the original bill filed in this cause, was to obtain a decree for the sale of the real estate of *Launcelot*

Dorsey vs. Dorsey, et al.—1833.

Dorsey, who died in 1829, and a division amongst his heirs of the proceeds of sale. A decree passed, and a sale was made, reported, and ratified.

Afterwards *Dennis Dorsey*, the appellant in this cause, and one of the heirs, filed a petition claiming to be a creditor, and to be paid out of the proceeds of the sale, upon the ground of the insufficiency of the personal estate, upon which no administration had been had, as the petition alleged. His claim consisted of a single bill for \$130, payable on demand, dated the 19th December, 1812; and an open account for services rendered by him to *Launcelot Dorsey*, for the period of seven years and eight months, commencing on the 20th December, 1812, at the rate of \$90 per annum.

On the single bill several payments were endorsed, the last of which was in September, 1825, and the following agreement proved to have been signed by the appellant, at the request of the obligor. "I do hereby agree, that I will not put the within note in suit against *Launcelot Dorsey*, nor call on him to settle the same, nor give it in the power of any other person to do the same, so long as he shall live, provided the within note shall not be near out of date."

Dathan Dorsey, and *Elder and wife*, the other heirs of *Launcelot Dorsey*, and the appellees here, by their answer denied the justice of the appellant's whole claim, insisting that it had been paid and overpaid, and they relied on the statute of limitations, in the following terms. "They further show cause, rely on, and plead in bar to the petitioner's claim, a certain act of the General Assembly of the then Province now State of Maryland, made at a session of Assembly held at the city of Annapolis, the 26th day of April, 1715, entitled, 'an act for limitation of certain actions for avoiding suits at law,' and pray to have the full benefit of the same at the hearing."

Depositions were taken and filed, and the cause submitted to *Bland*, Chancellor, who on the 6th of March, 1832, dismissed the petition with costs. From this order, the case was brought on appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

T. P. Scott for the appellant contended.

1. That the claim set forth in the petition is fully sustained by the evidence.

2. The allegation in the petition, that there are no personal assets or personal representative, is not denied by the answer, and being negatives, it was not incumbent upon the appellant to prove them. If the facts are otherwise, the defendants here have proved them.

3. The claim was presented in the proper form, and at the proper time. *Gaither and Warfield vs. Welch's estate*, 3 *Gill and Johns*. 259. *Duvall vs. Farmers Bank of Maryland*, 4 *Ib.* 292.

4. The defence of payment is not supported by the proof.

5. Limitations does not apply to such a claim. The single bill is on its face payable on demand, but the agreement not to sue or demand the money, forms a part of it, and prevented the obligee from suing, until the period of the obligor's death in 1829. *Waters vs. Riley*, 2 *Harr. and Gill*, 314.

6. But if limitations would apply to such a claim, yet the evidence of payments made on account, as set up and proved, take the case out of the statute.

7. Because the statute of limitations is not properly pleaded. *Wall's Ex'trx vs. Wall*, 2 *Harr. and Gill*, 79. *State use of Johnson vs. Green*, 4 *Gill and Johns*. 384.

Marriott, for the appellees.

The appellant's claim is two fold.

1. As to the single bill. The evidence shows conclusively that it has been paid and overpaid, by the receipt by the appellant, of the proceeds of the crops made on the fathers farm, and the sale of various articles for which he received the money : of the over payment of this claim, it is confidently asserted no doubt can be entertained.

2. In reference to the claim for services, he contended that the plea of limitations was a flat bar. The appellant has produced no proof that he ever made a demand of his father in his life-time, nor is there any proof that he ever admitted the correctness of the claim, or ever *promised to pay* it. No attempt is made by the appellant, to account for not demanding the money from the father in his life, who lived nine years after the services are said to have been rendered. A stale claim of this description, if it ever existed, brought forward at so late a period, and not until the death of the party alleged to owe the money, never will receive the countenance of a court of equity, unless supported by positive proof of a promise to pay. But the record in this case exhibits no such proof, and the *laches* of the appellant are not accounted for.

BUCHANAN, Ch. J., delivered the opinion of the court.

The petition of the appellant was properly dismissed by the Chancellor.

If the claim set up has any foundation in fact, it is clearly barred by the act of limitations, which is sufficiently pleaded; there being no promise or acknowledgment proved, express or implied, sufficient to take it out of the act.

But independent of that bar to his claim, it does not appear to be sufficiently made out in proof. On the contrary, he would appear to be himself a debtor to the estate, if he did not pay to his father the proceeds of the crops made upon the land while he lived with him, which it is proved came into his hands, together with the amount of sales of wagon stuff, rails and timber, and of the product of the farm during the time he lived upon it, after his father's death, all of which he received.

And the only proof on that subject (in the words of the witness) is, "that his father always demanded of him *an account* of the sales of the product of the farm," but no evidence that he made any payment on that account.

DECREE AFFIRMED WITH COSTS.

Cox, *et al.* vs. McCausland's Adm'r's.—1833.

RACHEL COX, *et al.* vs. McCAUSLAND'S ADMR'S.
December, 1833.

Under the act of 1824, ch. 196, a cause may be removed from the equity side of the county courts of the sixth judicial district, to the Court of Chancery, upon the suggestion of one of the complainants only.

APPEAL from the Court of Chancery.

This was a creditor's bill filed by the appellee and others, claiming to be creditors of *Israel Cox*, deceased, on the equity side of *Harford* county court, against the appellants, to set aside certain deeds made to them by the said *Cox*, on the 29th of January, 1817. The bill charges that these deeds were made to the appellants (the grantor's children and heirs,) but a few days before the death of the grantor, in fraud of creditors; and prays that they may be set aside, and that the lands attempted to be conveyed by them may be sold for the payment of his debts. The answers having alleged that the deeds were made upon valuable considerations, and put the complainants to the proof of their several claims, a number of depositions were taken, and returned by the parties. In May, 1827, the proceedings on the suggestion of one of the complainants were removed to the court of chancery. At December term, 1827, the case was referred to the auditor, on the application of the complainants, and on the 25th of June, 1828, that officer reported that none of the claims were proved. Additional proof was then taken, and at December term, 1829, the case was again sent to the auditor, who reported that the claim of *McCausland* had been proved, but that the claims of the other suing creditors were not. This report was ratified by the Chancellor, at December term, 1830. On the 24th of January, 1832, the case came up for final hearing, when the Chancellor ordered it to stand over, with leave to amend the bill by making the executor of *Cox* a party. The amendment was accordingly made, and the

Cox, et al. vs. McCausland's Adm'x.—1833.

answer of the executor, after alleging and showing by his accounts settled with the Orphans Court, that the personal estate had been exhausted, pleaded the act of limitations to all the claims of the complainants. On the 14th of July, 1832, *Bland*, chancellor, passed a final decree, dismissing the bill with costs, as to all the complainants except the appellee, *Elizabeth McCausland*, administratrix of *George McCausland*, on the ground of a failure of proof in support of their claims; but being of opinion that her claim was sufficiently established, he vacated the deeds as to her, and decreed that the property contained in them should be sold for the payment of her debt, and any other debts that might be due from the grantor. From this decree the present appeal was taken by the grantees.

Speed and *Learned* for the appellants.

T. P. Scott for the appellee.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, and DORSEY, J.

BUCHANAN, Ch. J., delivered the opinion of the court.

This is the case of a creditor's bill against the grantees, the heirs, and the executors of *Israel Cox*. The object of which is to have certain deeds executed by the testator to his children for all his real estate, set aside as fraudulent as against creditors, and the lands sold for the payment of the testator's debts.

The chancellor dismissed the bill, as to all the complainants, except *Elizabeth McCausland*, administratrix of *George McCausland*, whose claim he adjudged to be fully established; decreed each and all of the deeds to be fraudulent and void, as against creditors, and directed that the lands should be sold for the benefit of creditors; from which decree this appeal was taken. There is nothing in the point raised in argument, that the cause was never properly before the chancellor, having been removed to

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

the Chancery court from the *Harford* county court, sitting as a court of equity, on the suggestion of only one of the complainants. The act of 1824, *ch.* 196, authorising such removals is too explicit to admit of a doubt. The words are, “upon the suggestion in writing, of either, or any of the parties thereto.”

It appears that the personal estate of the deceased which came to the hands of the executor was wholly exhausted, and overpaid by the executor thirty-five cents, who moreover pleaded the act of limitations, and there is no proof that the deceased left any other personal estate. The creditors therefore were entitled to resort to the real estate. We think that the claim of *Elizabeth McCausland*, administratrix of *George McCausland*, is sufficiently made out in proof; and upon a full and attentive examination of all the proof in the cause, it appears to be perfectly clear to us, that the deeds from *Israel Cox* to his children, were grossly fraudulent and void as against creditors, and that the lands intended to be conveyed by them, were properly decreed to be sold for the payment of the debts of the deceased *Israel Cox*.

DECREE AFFIRMED WITH COSTS.

TRUMBO, EX'R OF NEFF vs. BLIZZARD & JACOBS.
December, 1833.

Where all usurious contracts are declared by law to be null and void, there can be no recovery either at law or in equity, in a suit instituted upon an instrument infected with usury, if the defence of usury be pleaded; the very instrument that is sought to be enforced being null and void.

When a mortgage is given on an usurious consideration, the plea of usury either by the mortgagor or his alienee, is a full defence to a bill for a foreclosure by the mortgagee.

But there is a recognized distinction between that and the case of a mortgagor who goes into Chancery, seeking relief against the mortgage on the

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

ground of usury, which will only be extended to him on his paying, or offering to pay, the principal and legal interest of the sum due, and this on the principle, that he who seeks equity, to obtain relief must do equity.

APPEAL from *Baltimore* county court as a court of Chancery.

The present bill was filed on the 28th May, 1829, by *Henry Neff* the appellant's testator, in his life-time to foreclose two mortgages, executed to him by the appellee *John Blizzard*, the one dated on the 25th April, 1818, the other on the 15th May, 1821, to secure the several sums of \$1000 and \$550, with interest, on the days therein limited.

The bill alleged that the appellee *George Jacobs*, was in possession of the mortgaged premises, claiming title thereto as the purchaser at a sheriff's sale, under a judgment rendered against the mortgagor, subsequently to the mortgages; which was admitted by the answers.

Both the answers alleged that the mortgages were given upon usurious considerations, and the answer of *Jacobs* relied on the plea of usury as a defence to the complainant's bill.

The evidence is sufficiently adverted to by his honor the chief judge, who delivered the opinion of this court.

The county court (ARCHER, Ch. J.,) on the 26th November, 1831, dismissed the bill with costs.

From this decree the appellant appealed to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and DORSEY, J.

Gill, for the appellant contended.

1. That the defence of usury set up by the answers is not sustained by the evidence.

2. That *John Blizzard* was not a competent witness for the defendants. It is his debt, and he is interested in the event of the suit, being responsible for costs. *Chambers vs. Chambers*, 4 *Gill and Johns*. 420.

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

3. That although the defence of usury may be sustained by the evidence, still the complainant is entitled to his principal and legal interest.

4. That it is not competent for *Jacobs*, who was a stranger to the contract between *Neff* and *Blizzard*, and who cannot derive any possible benefit by sustaining the charge of usury to set up that defence in this cause. *De Wolf vs. Johnson*, 10 *Wheat*. 367, 393. 4 *Johns. Ch. Rep.* 332.

T. P. Scott, on the same side.

First Point. *Blizzard* is not a competent witness; it is his debt, and he only can gain by defeating the claim. He is a party and is liable for costs if we succeed. 10 *Wheat. Rep.* 384.

Second Point. Reject *Blizzard's* testimony, and there is no direct evidence of the usury—but testimony of *Neff's* custom, and the weight of this testimony is in favor of *Neff*.

Third Point. It is a principle of equity, that if a party seeks to be relieved from a usurious contract, and comes into court as plaintiff, he must pay principal and legal interest. *Legour et al. vs. Wante*, 3 *Harr. and Johns.* 184. *West vs. Beanes*, 3 *Harr. and Johns.* 570. So also at law. *Lucas vs. Latour*, 6 *Harr. and Johns.* 100. 1 *Johns. Ch. Rep.* 368. 2 *Bro. Ch. Rep.* 649. 4 *Ib.* 436.

But we are told that if the usurer is plaintiff in equity as at law, and the defendant pleads and proves the usury, the plaintiff must lose his debt. Why so? Interest is lawful and not immoral; the rate of interest is matter of municipal arrangement, and usury is interest beyond the legal rate.

The moral and legal obligation to pay principal and legal interest, is beyond doubt in some cases, viz. where the borrower is plaintiff and seeks relief. Why not also when the borrower is defendant and seeks relief?

The forfeiture (by the usurer) is at law. Equity does not decree forfeits, but on the contrary relieves from them.

What is forfeited? Not the debt, not the moral obligation to pay, these remain, the securities are forfeited. 1704, *ch.* 69. *sec.* 2, 3.

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

Not the debt, but the evidence of debt is destroyed by proof of the usury.

Not the debt, for like limitations the evidences of the debt may be destroyed—dead—but the debt remain and be revived. A promise to pay a bond barred by time, will not take it out of the statute, 3 *Gill and Johns*. 504, because the bond, the evidence of debt is dead, but the moral obligation remains, the debt remains, and *assumpsit* may be maintained on the new promise. 7 *Harr. and Johns*. 464-5.

So if the usurious bond is destroyed and a new one taken on legal interest, it is good. 2 *Taunt*. 184. 10 *Wheat*. 392. And why? because the moral obligation remains, the debt remains, the old dead securities or evidences of debt are put away, but the debt is not gone.

Again, if the security of the borrower pay the usurious debt and has a counter security, he can recover on it. *Robinson vs. May, Cro. Eliz*. 588. And why? The usurious bond (the evidence of debt) was void, was forfeited, but the debt remained.

Limitations does not extinguish the debt, but suspends or destroys the remedy. 1 *Harr. and Gill*, 212, 213. So usury does not destroy the debt, but only the evidence.

Again, the evidence of debt (the bond or note for instance) is voidable only, not void. 10 *Wheat. Rep*. 392, 393. And although the usury is apparent, it must be pleaded. 1 *Chitty on Plead*. 425. The debt remains, but you may exclude the evidence.

The defendants have pleaded the usury; if the court think their plea sustained by the evidence let them have the benefit of it; take off the usury, but give the plaintiff principal and legal interest.

The remarks of the court in 5 *Johns. Ch. Rep*. 136, and in 4 *Gill and Johns*. 439, 440, seem to imply that in equity, if the usurer is plaintiff, and the usury is pleaded by the defendants and sustained by the evidence, the plaintiff's bill must be dismissed. But in these cases this point did not arise, and the remarks are to be considered as the dictum

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

of the judge who pronounced them. So also in 1 *Fonbq. Equity*, page 13, note (h) with reference to *Roll's Abr.* but the reference to *Roll* does not sustain the annotator on *Fonblanque*. *Roll* speaks of suits in courts of common law.

Fourth Point. See 10 *Wheat. Rep.* 393, 394, in point. The principle contended for is also recognized in 4 *Johns. Ch. Rep.* 332.

BUCHANAN, Ch. J., delivered the opinion of the court.

Having attentively examined the testimony spread upon this record, we are clearly of opinion that each of the deeds of mortgage set out in the bill of complaint, was given for a grossly usurious consideration.

A number of witnesses appear to have been examined, some of whom swear that they had borrowed money of *Neff*, the appellant's testator, at six per cent. interest; others that they had known him to lend money at an interest of six per cent. and had never known him to charge more; others, that they had calculated the interest for him, on notes that he held of others, and always at the rate of six per cent. One swears that he had himself borrowed money from him at *nine* per cent., and another that he had borrowed from him at *twelve* per cent.

The two mortgage deeds from *Blizzard* to *Neff* are dated, the first on the 25th April, 1818, and the second on the 25th of May, 1821. *Buckingham* swears that in June 1829, *Neff* told him "that he lent no money to any man for less than twelve per cent. interest, and had not done so for many years, and would not do it to any one." *Ogg* swears "that *Neff* told him about twelve or thirteen years ago, that *John Blizzard* was an honest little man, and was paying him more than twelve per cent. interest." *Merriman* swears, that sometime in the year 1818 or 1819, when speaking with *Neff* concerning *Blizzard*, *Neff* raised his hand towards *Blizzard's* house which was in view, and not more than a quarter of a mile off and said, "it is the same thing to me, as our neighbour pays me twelve per cent." And *Parish*

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

swears, that some time in the year 1828, *Neff* told him, "that *George Crutman* had been paying him twelve per cent. for twenty years, and that *John Blizzard* had been allowing him twelve per cent. for fifteen years, which was secured by his notes and his property, and that *Blizzard's* debt was secured in the same way, that his, the witnesses was, which was by notes and mortgage of his property."

It is manifest therefore, independent of the evidence of *John Blizzard* himself, that whatever may have been the rate of interest at which *Neff* had loaned money to other persons, (which is not very material to this case,) he was exacting twelve per cent. from *Blizzard*, and there being no evidence of any pecuniary transaction between them, except the mortgages and the considerations for which they were given, the declarations of *Neff* must be taken to have had reference to these transactions, and to taint them with usury.

But it is said, that admitting the mortgages to have been given on usurious considerations, *Jacobs*, who is in possession of the mortgaged premises, by purchase at a sheriff's sale under a judgment against *Blizzard*, cannot be permitted to defeat the claim of the appellant, who is seeking to foreclose the mortgages; and for that *De Wolf vs. Johnson*, 10 *Wheat.* 367, is relied upon. We had thought differently, but have been driven by the reference to that high authority, to look into the books upon which the opinion delivered in that case appears to have been founded. And with all the deference to which the Supreme Court is so eminently entitled, we have not been able to arrive at the same conclusion.

Indeed as far as the principle is there ascertained, that the alienee of a mortgagor cannot avail himself of the defence of usury, to a bill of foreclosure by the mortgagee, that case has since been overruled in the case of *Lloyd vs. Scott*, 4 *Peters' Rep.* 205. Where all usurious contracts are declared by law to be null and void, there can be no recovery either at law or in equity, in a suit instituted upon an instrument infected with usury, if the defence of usury be

Trumbo, Ex'r of Neff vs. Blizzard and Jacobs.—1833.

pleaded; the very instrument that is sought to be enforced being utterly void.

Where a mortgage is given on an usurious consideration, the plea of usury, either by the mortgagor or his alienee, is a full defence to a bill in Chancery for a foreclosure by the mortgagee, who goes to enforce a void instrument. But there is a recognized distinction between that, and the case of a mortgagor or his grantee who goes into chancery seeking relief against the mortgage on the ground of usury; which will only be extended to him on his paying or offering to pay the principal and legal interest of the sum due, on the principle that he who seeks equity, to obtain relief must do equity.

By the law of this State, all bonds, contracts, and assurances whatsoever, whereby there shall be reserved an interest above the rate of six per cent. on money loaned, are declared to be "utterly void."

Here there was an interest of twelve per cent. intended to be secured, and the defendant, *Jacobs*, having purchased the mortgaged premises, at a sheriff's sale regularly made under a judgment against *Blizzard* the mortgagor, and this being a bill by the mortgagee for a foreclosure, we think he is entitled to avail himself of the defence of usury, which is insisted upon in the answers against this mortgage, so tainted and void.

DECREE AFFIRMED WITH COSTS.

Boyd and others vs. Boyd.—1833.

WM. L. BOYD AND OTHERS by J. L. BOYD, THEIR FATHER
AND GUARDIAN vs. DENNIS BOYD.—*December, 1833.*

Upon a bill filed by complainants in the character and capacity of infants, claiming the equitable interposition of Chancery in their behalf, the fact of infancy is a material allegation, and should be sustained by proof, if not admitted by the answers.

Where a testator devised as follows, viz. “\$10,000, of which you (the devisee) are already in possession of the greatest part, is to be at your disposition, and for your use, free of interest, during your natural life-time; but after your death to be invested in bank stock, in the name of, and for and on account jointly and equally of the children of J;” and the residuary legatees, infants, filed a bill to invest the fund immediately; a charge that the fund was in danger in the hands of the legatee for life, was held to be indispensable under the circumstances of the case, to warrant the court in placing the fund in a different situation from that directed by the testator.

A defendant in Chancery was returned summoned, and did not answer: an interlocutory decree was passed against him, and an *ex parte* commission issued, under which some evidence was returned. The cause was then put down for final hearing, and the bill dismissed by the Chancellor. Upon appeal, it appearing that the defendant had a sum in his hands which the complainants were entitled to have invested for their use, this court reversed the decree of the Chancellor, and remanded the cause, with liberty to amend proceedings, and produce further proofs.

APPEAL from the court of Chancery.

This bill was filed by the appellants on the 11th April, 1831. It stated that *William L. Boyd*, the uncle of the complainants, all of whom are minors, died some time in the year 1827, having first made his last will and testament, now duly admitted to probate, and that letters of administration with the said will annexed have been granted to the appellee by the Orphans court of *Baltimore* county. That by the said will, the appellee is entitled, of the testator's estate, to the use of \$10,000 during his natural life, free of interest, with directions that the same shall be invested after his death in bank stock, in the name of, and for account jointly and equally of the complainants, the children of

Jeremiah L. Boyd; and that all other moneys that should be remitted to said *Dennis*, (the appellee) the testator directed to be invested in stock of the *Bank of the United States*, also in the name of, and for the equal benefit of the said complainants. That there has been remitted to and received by the appellee, of the estate of the said testator, the sum of at least \$10,000, the whole of which, as he left no debts unsatisfied, is subject to the directions of his will. That twenty-three months have elapsed since the grant of letters to the appellee, whose pecuniary circumstances are such as to make it probable, that without the interposition of the Chancery court for the security of the complainants, the said sum of \$10,000, mentioned in the said will, will not after the death of the said appellee remain entire to be invested for them; but on the contrary they believe, and so charge their fears to be, that if said sum of \$10,000 be allowed to remain blended with the common property of the appellee, and thus involved with the chances of his business, the views of the testator with reference thereto will be entirely defeated. The bill then alleged, that the residue of the testator's estate over the \$10,000 should be directed to be invested for their use, according to the will, which they allege not yet to have been done. That the complainants do not know what sums of money or property the appellee has received, for which he is accountable as aforesaid to them; or whether he may not at the date of the will have been indebted to the testator for money lent, or on other account. The bill then prayed for a discovery in reference to all these matters, and that the appellee may be compelled to invest the said sum of \$10,000, or to execute such conveyances and securities in that behalf, as to the Chancellor shall seem right, for the protection of the interests of the complainants, and for general relief.

The will, a copy of which was filed as an exhibit with the bill, was in the form of a letter, dated at *Rio de Janeiro*, 19th July, 1827, and was in the following words.

“Dear *Dennis*,—I have been confined for two weeks, but am about again, and being alarmed at the nature of my disease, determined at once to try a sea voyage, and therefore have taken my passage in the brig *Cervantes*, to sail in the morning for *Baltimore*, where I hope to be before you have any intimation of my coming.

“In case of my death before we meet again, and as I have made no will or disposition of my affairs, I want you to observe, and make such a disposition of the moneys that may come into your hands, as expressed by me in this letter, to wit: ten thousand dollars, of which you are already in possession of the greatest part, is to be at your disposition and for your use, free of interest, during your natural life time, but after your death to be invested in bank stock, in the name of, and for account jointly and equally of the children of *Jeremiah L. Boyd*.

“All the money that may be remitted to you from *Rio de Janeiro*, by the house of *James Birckhead & Co.* for my account, is to be invested in *United States Bank* stock, to be held in the name of, and for the equal benefit of the children of my brother, *Jeremiah L. Boyd*, the interest to be appropriated annually towards their education, and the principal not to be divided until the youngest comes of age. Understanding this my wish, I trust you will comply with it most certainly, and by no means suffer any other appropriation of my effects. Hoping to be with you in forty-five days from this time, and improved in health, I remain your affectionate brother, *Wm. L. Boyd*.”

The defendant having been returned “*summoned*,” and not having answered according to the rules of the court, an interlocutory decree passed, and an *ex parte* commission issued on the 17th October, 1831, to prove the allegations of the complainants’ bill, in conformity with the act of 1820, *ch.* 161.

The only evidence returned with the commission was an attested copy of the will, and an account settled by the appellee with the Orphans court of *Baltimore* county, on the

1st March, 1832, in which, after charging himself with the amount of assets then in his hands, and taking credit for the \$10,000 bequeathed to him by the testator for life, and a sum invested by him in *United States Bank* stock, in the names of the appellants, in pursuance of the directions of the will, there remained a balance in the hands of the appellee, as administrator, of \$2092 62.

The cause without further proceedings was set down for final hearing in the court of Chancery, and at the July term of that court in the year 1832, *Bland*, Chancellor, dismissed the bill with costs.

From this decree the complainants appealed to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Mayer and Flusser, for the appellants, contended,

1. That the appellants were entitled to call on the defendant for security for the forthcoming of the fund at his death. 2 *Com. Dig.* 770. *Hyde vs. Parrat*, 1 *Pr. Wms.* 1. 2 *Roper on Wills*, 191-2. *Studholm vs. Hodgson*, 3 *Pr. Wms.* 300, 304. *Foley vs. Burnell*, 1 *Bro. Ch. Rep.* 274.

2. If however the defendant cannot be called upon for security, he can at all events be compelled to invest the fund.

3. The allegations of the bill in regard to the perilous condition of the fund are sufficient, and the account settled with the Orphans court sufficiently proves those allegations to be true. *Johnson vs. Mills*, 1 *Ves. Sr.* 283. *Hoare vs. Parker*, 2 *Durn. and East.* 376.

4. But in the case of a *pecuniary legacy*, an allegation of danger is not necessary. 1 *Jer. Eq.* 350, 351. *Green vs. Pigot*, 1 *Bro. Ch. Rep.* 105. *Johnson vs. Mills*, 1 *Ves. Sr.* 283. 1 *Cox's Ch. Rep.* 244. *Ferrard vs. Prentice*, *Amb.* 273. *Batten vs. Earnby*, 2 *Pr. Wms.* 163. 1 *Vern.* 189.

Boyle, for the appellee.

1. There must be a distinct allegation, and proof of danger to the fund, before the court can call for security from the legatee for life. *Foley vs. Burnell*, 1 Bro. Ch. Rep. 279. *Slanning vs. Style*, 3 Pr. Wms. 336.

2. In this case there is no evidence, either that *J. L. Boyd* is the guardian of the complainants, or that they are minors, or that the debts of the testator have been paid, or of the insolvency of the appellee, or danger to the fund; of all which he contended there should have been proof.

STEPHEN, J. delivered the opinion of the court.

William L. Boyd in the month of July, 1827, then being in a foreign country, and contemplating the possibility of his death before his arrival in the *United States*, addressed a letter to the defendant, (which has since been admitted to probate as a testamentary paper) in which is contained the following disposition of a part of his property. "Ten thousand dollars, of which you are already in possession of the greatest part, is to be at your disposition, and for your use free of interest during your natural life-time, but after your death, to be invested in bank stock, in the name of, and for account jointly and equally of the children of *Jeremiah L. Boyd*." The event of his death, of which he seemed to have had an apprehension, did occur before he returned to this country. The object of the bill filed in this cause was to obtain the interposition of the court of Chancery, to have this fund placed in a state of security, so that the legatees in remainder might have the benefit of it after the termination of the interest for life therein given as above to his brother. The complainants are stated in the bill to be infants under the age of twenty-one years, and sue by the said *Jeremiah L. Boyd* as their father and guardian. To this bill no answer was filed; but a commission was issued under which two exhibits only were returned, that is to say, the above mentioned letter, and an account returned to the Orphans court of *Baltimore* coun-

ty by the defendant, to whom letters of administration with the will annexed were granted. In this state of the proceedings, the case was submitted to the Chancellor, by whom the bill was dismissed with costs. The question to be decided by this court is, whether this decree of dismissal under the circumstances of the case was correct; or in other words, whether the complainants were entitled to the relief sought by their bill. It is to be observed in the first place, that there is a total absence of all testimony to establish several essential facts necessary to be proved in this case, to entitle the complainants to the relief prayed by their bill. In the first place, they claim to be relieved in the character of infants, suing by their father and guardian; of the fact of their infancy at the time the suit was instituted, there is not the shadow of proof. They claim the interposition of the equitable powers of the court in the character and capacity of infants, suing by their father and guardian as their next friend, (for as such for the purposes of this suit we are disposed to consider him,) and yet have offered no evidence of their right or title to assume such a standing in court: without a proof of this fact, we do not think it was competent for them to sue in that capacity; and even if the charge of the fund being in danger or peril, in the hands of the legatee for life be sufficiently made, (of which doubts may be reasonably entertained, as there is no positive averment of that fact,) there is not a particle of evidence to establish or sustain that allegation. That such an averment ought to have been made and proved, under the particular circumstances of this case, to warrant the interference of a court of equity, to place the fund in a different situation from that directed by the testator, we think but little doubt can be entertained. The legatee for life was the first object of his bounty; he manifestly reposed in him by the terms of his will the most unlimited confidence. The ten thousand dollars, the subject of the gift, were to be at his *disposition*, and for his use, free of interest during his natural life; and unless the complainants adduced some

proof that this confidence had been misplaced, or was likely to be abused, and that their interest in remainder was about to be placed in jeopardy, we do not think that a withdrawal of the fund from his hands, or compelling him to give security, would comport with the benevolent intentions of the testator towards him. The language of the will is peculiarly strong and emphatical; he was to have the use and *disposition* of the property free of interest during his life, and in the exercise of this right of limited ownership over it, secured to him by the will, we do not think he ought to be disturbed or controlled, unless the interests of those who were the secondary objects of the testator's bounty manifestly required it. In *Jer. Eq. Jr.* 349, 350, it is said, "that formerly if personal estate was given to A for life, and afterwards to B, the latter or his personal representatives might in all cases have obtained a decree to compel the former to secure the same to him after his death, but that the present practice, in ordinary cases, where the property consists of specific chattels, is not to require the defendant to give security unless there is well founded apprehension of danger thereto, but merely to oblige him to make out, sign and deliver to the plaintiff, or into the possession of the court, an inventory thereof; when, however, the property is not of a specific character, the practice is somewhat different; for in the instance of a legacy payable at a future time, in which it is frequently and most usefully applied, this court will direct the amount thereof to be paid into court, whether the period for payment be fixed or uncertain, and will regulate the application of the proceeds in the mean time, in such manner that justice may be done between all the parties, and will thus interfere, although there should not be any danger of loss from the misconduct or misfortune of the defendant." The authorities referred to in support of this principle, it is conceived, have no application to this case; but were cases of legatees suing executors to have their legacies secured, and they were decreed to be secured, as declared in *Ambler*, 273, "on the

Boyd and others vs. Boyd.—1833.

general rule of the court;" but no case has been found, where, without an allegation of danger or misconduct, a legatee for life, as in this case, has been decreed to give security on "the application of those having an interest in remainder; if there be such a case, it has escaped our researches." So in 2 *Kent's Com.* 285, Chancellor *Kent*, speaking upon the same subject says, "the interest of the party in remainder in chattels, is precarious, because another has an interest in possession; and chattels, by their very nature, are exposed to abuse, loss and destruction. It was understood to be the old rule in Chancery, that the person entitled in remainder could call for security from the tenant for life, that the property should be forthcoming at his decease; but that practice has been overruled. *Ld. Thurlow* said, that the party entitled in remainder could call for exhibition of an inventory of the property, and which must be signed by the legatee for life, and deposited in the court; and that is all he is ordinarily entitled to. But it is admitted, that the security may still be required in a case of real danger that the property may be wasted, secreted or removed." In *Roper on Leg.* 231, we find the following remarks, "it seems to have been the ancient practice of the court of Chancery to require the person entitled to the partial interest, to give security to or for the benefit of the legatee appointed to succeed him. The practice, however, became gradually altered as above stated, upon a conviction that requiring from the first legatee only an inventory of the property specifically bequeathed, was attended with more equal justice to both legatees. Besides, as the testator had thought proper to entrust the first legatee with a personal use of the articles for life, it was not for the court to destroy that confidence except under special circumstances. But if such circumstances be shown and proved, as would make it dangerous to trust the chattels in the hands of the first legatee, without taking a sufficient security, as in the instance of insolvency, such security will be required." He then adds, that

Ld. Thurlow had ruled that there ought to be *danger* in order to require security. It is true that where the bequest to the legatee for life is of a sum of money, the reason for requiring security from the legatee for life, may be stronger than in the case of a bequest of specific chattels; but we do not think, that the court ought to exercise an arbitrary power of requiring security in such a case, where the testator has required none, unless there be some evidence, that the responsibility of the legatee for life has been in some degree impaired or altered by a change of circumstances, since that confidence was reposed. In most, if not all the cases, where the security has been required, it has been where the fund was in the hands of the executors; in such cases the court will order the executors to give security, or in default to pay the legacy into bank, as was done in *2 Dickens*. 568. So in *Ambler's Rep.* 273, the case was, a "bill for security of a legacy which the defendant, the executor, was to pay at the end of ten years from the death of the testator; and though no particular reasons were assigned, as wasting assets, or insolvency in defendant, yet decreed on the general rule of the court by *Sir Thomas Clarke*, master of the rolls, who sat in the absence of the lord chancellor. We think we should not conform to the plain and manifest intention of the testator in this case, by requiring the legatee for life to give security, unless there be some proof that the interests of the legatees in remainder are in danger, or in default thereof of ordering the fund to be taken out of his hands. It is true, he is in this case the administrator with the will annexed; but by his settlement with the Orphans court, the fund is placed in his hands as legatee, and in that capacity alone does he now hold it, and not in his representative character. During his life the entire and absolute interest in the money which is the subject of the bequest, is vested in him: he is clothed with no trust for the benefit of the complainants who have no right to have the fund invested for their use, until the expiration of his life estate. They have therefore no claim to the inter-

position of this court, unless they can show that by suffering the fund to remain in his hands, and in the language of the will, at his disposition, their residuary interests will be put in jeopardy. In such a state of things, if they should be made satisfactorily to appear, it would, no doubt, be the duty of this court to take the necessary steps to carry the intentions of the testator fully and completely into effect. But we think that according to the well established principles of equity, the complainants are entitled to the discovery, as prayed by their bill, of all such sums of money or property as may have come to the hands of the defendant, and that for the purpose of obtaining such discovery, the defendant should be compelled to answer their bill of complaint; we also think that the balance of two thousand and ninety-two dollars and sixty-two cents, admitted to be in the hands of the defendant, and unappropriated to the use and benefit of the children of the said *Jeremiah L. Boyd*, as well as any other money or property belonging to the estate of the late *William L. Boyd*, exclusive of the ten thousand dollars, which may appear to have come to his hands in the manner specified in the will, and which may not be necessary for the payment of debts, ought to be decreed to be invested for the benefit of the children of said *Jeremiah L. Boyd*, according to the provisions of the will of the said *William L. Boyd*. If, moreover, the complainants have any merits in their case, and are entitled to an indemnity against loss or injury, by reason of actual or impending danger, they will have an opportunity of evincing it by an amendment of their proceedings, and by furnishing the necessary evidence of that fact. For the attainment of that object, should the security of their interests require it, this court will pass an order remanding the case to the court of Chancery, where such measures may be adopted by the complainants, as justice and equity may require.

CASE REMANDED TO THE COURT OF CHANCERY.

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

EVAN T. & ANDREW ELLICOTT vs. THOMAS ELLICOTT.
December, 1833.

Where the estate of a deceased person sold for the payment of debts is insolvent, his creditors must be paid interest on their debts up to the day of its sale.

The mode of auditing accounts in such cases, is to calculate interest on claims against the deceased up to the day of sale, from which time the claimants, on the amounts ascertained to be due them by the audit, become as it were creditors of the fund arising from the sale, and entitled respectively to their proportions of the interest it may bear.

If the sale be for cash, no interest is received by the creditor; if on a credit, (and consequently carrying interest) should a creditor be paid as using due diligence he would be, on the day of the receipt of the money by the trustee, they would receive not only simple interest on their debts from their maturity, but interest compounded from the day of sale.

Where the creditor in equity causes his debtor's property to be sold for cash to the full amount of principal and interest, the debtor is absolved from all further liability.

The same principles which regulate the rights of creditors in sales simply for cash, or on a credit, are applied in mixed sales; which are in part for cash, and in part for credit.

The cash portion of the proceeds of sale, or money first received, or so much thereof as may be necessary for that purpose, is first applied to the payment of the costs of suit, the commission and expenses attending the sale, and the debts; the residue is the property of the debtor.

If the cash portion of the proceeds of sale, applicable to the payment of debts, be inadequate for that purpose, the portion of the debts unsatisfied thereby (and no more) will bear the same interest which the credit part of the sales bear.

A trustee appointed by the court of Chancery to sell property in pursuance of a decree, in his character as such, may for the benefit of those interested in the fund in his hands, and who are aggrieved by an erroneous order for its payment or distribution, appeal to this court for redress.

Before a trustee can be deprived of his ordinary allowance for commissions and expenses accruing under the execution of the trust confided to him, he must be notified of the charge against him, and afforded an opportunity of showing his innocence; he cannot be deprived of those allowances by the mere order of the court of Chancery, requiring him to pay them over to creditors where no complaint has been filed against him as trustee, or upon the presumption that he is responsible for interest upon money in his hands.

Where a decree or order is reversed upon appeal, it is the duty of this court to pass such a decree as ought to have been passed by the Chancery court.

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

In a mixed sale, part for cash and part on a credit, where the trustee has paid one creditor too great a proportion of the cash, it may be corrected by subrogating the trustee to the rights of the satisfied creditor, as to the excess, upon the other part of the proceeds, for the benefit of the unsatisfied creditors only. The trustees personally can derive no benefit from such a substitution, and the like principle shall prevail under the same circumstances, as to excessive payments made out of the credit portion of the sales.

Where a mortgagor is under no obligation to come in under a bill for the sale of a deceased person's real estate for the payment of debts, but may cling to the property specifically pledged for the payment of his debt, the court will not cast the interest in such a case accruing after the day of sale upon the other creditors, but upon the heirs of the mortgagor, but will allow the mortgagee his full claim, principal and interest, out of the purchase money, and allow the trustee a credit accordingly for payments to such mortgagee.

APPEAL from the court of Chancery.

The bill in this case was filed on the 21st of September, 1827, by the appellee against the appellants and others, heirs at law of *Elias Ellicott*, deceased, for the sale of his real estate for the payment of his debts; for which purpose a decree was passed on the 12th of October, 1827, appointing the appellants trustees, to make the sale. The sale was accordingly made and reported by them to the Chancellor on the 23d of April, 1828, amounting to \$18,450, and the same was duly ratified and confirmed on the 11th of July, 1828. On the 28th November, 1831, the auditor reported a statement of the claims filed against the deceased's estate, applying the principal proceeds of sales to the payment of the trustees' allowances, for commissions and expenses, the costs of suit and the claims stated, including the claim of the appellee, (assigned to *Thomas C. Jenkins*) amounting, with interest to the day of sale, to \$3,815 50, and distributing the balance amongst the heirs of the deceased; upon which the Chancellor, *Bland*, passed the following order on the 27th December, 1831:

“Ordered that the foregoing report and account be, and they are hereby ratified and confirmed, and the trustees are directed to apply the proceeds accordingly, with a due proportion of interest that has been or may be received.”

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

On the 13th January, 1832, the trustees reported that a part of the proceeds of sale was received by them on demand, without interest, and that the residue was still unpaid, and they submitted to be charged with that residue, with interest thereon from the day of sale.

On the 23d of the same month, the auditor, at the instance of the trustees, stated a further account, distributing the interest admitted to be in their hands, rateably amongst the creditors and heirs at law of the deceased.

To this account the assignee of the appellee excepted, 1. Because by said account he is not allowed legal interest upon the claim assigned to him against the said estate, although the proceeds of sale are fully competent to discharge said claim, with full legal interest thereupon, and all the other claims filed against the said estate, up to the time of payment of said claims.

2. Because the heirs at law of the said *Elias Ellicott* are admitted as such to a proportion of the interest received upon the sale of the said estate, in the report and account, whereby the exceptor as a creditor, is deprived of his full legal interest on his claim as aforesaid.

These exceptions were sustained by the Chancellor, by his order of the 11th February, 1832, and the auditor was directed to state an account accordingly.

On the 15th of February, 1832, the auditor reported a further account whereby the appellee was allowed six per cent. interest on \$3,815 50, from the day of sale to the date of this report, making the sum of \$4,690 52.

This report was confirmed by the Chancellor's order of the 17th February, 1832, directing and requiring the two trustees to pay the commissions and costs, and also to each one of the said creditors the full amount of the claim due to him as stated, with legal interest on the amount stated, from the date of the said report until paid, and then to distribute the residue of the said proceeds of sale, among the heirs at law of the deceased equally, with a due proportion of interest that has been or may be received.

The appeal was taken by the trustees from the orders of the 11th and 17th of February.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

Alexander, for the appellants, contended,

1. That the order of the 27th December, 1831, settled the rights of the parties, and the account reported by the auditor on the 23d January, 1832, is stated in conformity with said order. As long as the ratifying order of the 27th December, 1831, remains unrevoked, it is binding upon the rights of the parties in this cause. 2 *Mad. Ch. Pr.* 517. *Jacob Rep.* 284. 3 *Cond. Ch. Rep.* 133.

That order is not only in conformity with the practice of the court, but is agreeable to the justice of the case. A creditor has no right to ask that more of his debtor's property shall be sold than will pay the principal and interest of his claim, at the period of the sale; and if from any cause, not attributable to the debtor, there is a delay in the receipt of the money, the loss should not fall upon him. These sales are like sales by the sheriff, who can only sell enough to pay the amount due at the time of the sale, though the creditor may not be at liberty to demand the money until the return of the writ, which may not be for months afterwards. The same consequences result when money is paid into court by the vendee of an estate for the use of the vendor. In such a case the vendee is only bound to pay the amount of principal and interest, due at the time he pays it in, though a long period may elapse before the vendor can receive the money. The payment to the trustee, or into court, is for the benefit of the creditor, and no matter how long it may be before he actually gets the money, the loss of interest should fall on him.

But the order of the 17th of February, 1832, compounds the interest twice—first to the day of sale; and then from the day of the last account to the day of payment.

Evan T. and Andrew Ellicot vs. Thomas Ellicott.—1833.

2. If, however, this creditor is entitled to the interest allowed him, it certainly should not be allowed as against his heirs at law; who are no way in default, but against the trustees, if any misconduct can be imputed to them.

Johnson and Jenkins, for the appellee.

1. In the original report of the sale by the trustees, there is nothing to show, whether the property was sold for cash, or on credit; nor was it until January, 1832, that the appellee was informed that the whole of the purchase money was not on interest; and consequently, neither the creditor or Chancellor can be considered as concluded by the first report, and order of ratification. *Hoye vs. Penn*, 2 *Harr. and Gill*, 478. The Chancellor may at any time in the progress of a cause, review and reverse orders passed by him. *Duvall vs. Farmers' Bank*, 4 *Gill and Johns*. 294. *Mac-cubbin vs. Cromwell*, 2 *Harr. and Gill*, 443. These heirs stand in the place of the ancestor, and if he could not deprive his creditors of their full claims, principal and interest, so neither can they. *Hoye vs. Penn*, 2 *Harr. and Gill*, 476. The appellee insists, that the creditors must be fully satisfied, principal and interest, before the heirs are entitled to any thing.

2. If, however, the Chancellor's orders would be reversed; if the heirs at law had appealed; still as they have not done so, and the only parties before this court are the trustees and the creditor, the orders must be affirmed. The heirs at law are to be considered as acquiescing; and the trustees cannot be allowed to avail themselves of any supposed injury done them. All the other parties may have been paid on the day of sale. The equitable rights alone of these appellants can be considered, and the question is, whether as against them, the appellee is not entitled to be paid in full out of the fund which they admit to be in their hands. If the decree should be reversed, this court will pass such decree as may be proper, upon the whole merits of the case; even although the grounds of the modified de-

Evan T. and Andrew Ellicott vs Thomas Ellicott.—1833.

cree were not presented by the exception. *Winder vs. Diffenderffer*, 3 *Gill and Johns*. 311. The ground of complaint by the appellants is, that they had not received interest on their proportions of the estate of the deceased debtor, as two of his heirs at law. They would have the same right to claim interest on their commissions as trustees. Such an allowance would be refused them, upon the ground that they have the money in their hands; and for the same reason they are precluded from claiming interest on their portions as heirs at law. They have had the money for those portions also, in their own hands.

This case is to be viewed as if these appellants were the only heirs of *Elias Ellicott*. Viewed in this light, and they are presented as admitting the appellees' claim, consenting to a decree, paying their own claims and commissions, and holding in their hands money belonging to the creditor, and refusing to pay interest upon it. It is said that this is like the case of money levied by a sheriff under a *fi fa*. who makes the debt, interest and costs up to the day of sale, and then the interest stops. So it does as against the defendant. But suppose the sheriff fails to return and pay over the money in due time, would he not be liable for interest? He certainly would, and so will these trustees.

Alexander in reply.

If these orders are calculated to do injustice to any of the heirs of *Elias Ellicott*, they must be reversed upon the appeal of the present appellants. The misconduct of the trustees is not a ground relied upon in the exceptions, and this court consequently cannot make such misconduct the ground of their decree, even if they should be satisfied of its existence. They have had no notice, that such a charge would be made, and did not come prepared to defend themselves against imputed misconduct; and would, of course, be taken by surprise, if their conduct is thus arraigned. If, however, this could be done, the order of the Chancellor must be reversed; because it does not

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

direct the money to be paid by the trustees, but by the heirs at law, against whom no misconduct is, or can be alleged. So far as the debtor or his estate is concerned, a payment to the trustee, or sale of his property to the amount due, is a payment to the creditor; and the question here is not between the creditor and trustee, but between the creditor and heirs at law. The case of *Hoye vs. Penn*, 2 *Harr. and Gill*, 478, does not affect this case. That only decides, that where the purchase money is not paid the resale is at the risk of the heir at law. But here the money was paid to the trustee, which is equivalent to a payment into court. If the decree is reversed in favor of the present parties, all others interested are entitled to the benefit of the reversal.

DORSEY, J., delivered the opinion of the court.

Three reasons have been assigned on the part of the appellee, why the decretal orders appealed from should not be reversed. *First*, because none of the parties interested have any cause to complain of them. *Secondly*, that if such cause of complaint does exist, as regards those distributees of *Elias Ellicott*, who are not *nominatim* parties to this appeal, their equities cannot be relied on as grounds of reversal by the appellant trustees. And *thirdly*, that if the appellants are injured in their rights as distributees, they have in the discharge of their duty as trustees, been guilty of such gross negligence and misconduct, as to have rendered themselves justly chargeable with a still greater amount of loss, than that to which their individual rights have been subjected.

We will proceed to consider these propositions in the order in which they have been stated. To sustain the orders from which the appeal has been taken, it is asserted to be a rule in courts of equity of this State of universal truth, that where the estate of a deceased person, sold for the payment of his debts, is solvent, his creditors must be paid interest on their debts up to the time of their payment. If

up to the day of sale, instead of the day of payment, had been the time specified, this assertion could not have been controverted. But there exists not, and never did exist, in our Chancery court such a rule as that which has been stated. The universal mode of auditing accounts in that court, in such cases, has been to calculate interest on claims against the deceased up to the day of sale, from which time the claimants on the amounts thus ascertained, become as it were creditors of the fund arising from the sales, and entitled respectively to their proportions of the interest it may bear. If the sale be for cash, no interest is received by the creditors after the day of sale; if on a credit (and consequently carrying interest) should the creditors be paid, as using due diligence they would be, on the day of the receipt of the money by the trustee, they would receive not only simple interest on their debts from their maturity, but interest compounded from the day of sale. And this practice of the court of Chancery is founded on the soundest principles of equity and justice. If a creditor goes into that court for relief, and causes his debtor's property to be sold for cash, to the full amount of principal and interest, ought not the debtor to be absolved from all further liability? So, on the other hand, when the sale is on a credit, the delay being for the debtor's benefit, the creditor is placed in as eligible a condition in legal contemplation, as if he had been paid his debt and interest on the day of sale; the amount thereof bearing interest from the time of sale, until it is received by the trustee, who hands it over to the creditor the moment it is called for; (the necessary audit with its ratification being first obtained.) The procuring of which, though properly the act of the diligent, faithful trustee, is equally within the power of any of the creditors.

The same principles which regulate the rights of creditors in sales simply for cash, or on credit, are carried out in mixed sales, which are in part for cash, and in part for credit. The cash portion of the proceeds of sale, or money first received, or so much thereof as may be necessary for

that purpose, is first applied to the payment of the costs of suit, the commission and expenses attending the sale and the debts; the residue is the property of the debtors. Whether the sale be for cash, or on credit, makes not the slightest variation in the form of the auditor's statement. The only difference is in the order of ratification; which in a credit sale directs the application, not only of the amount of sales, but of the interest "in due proportions, which has been or may be received." If the cash portion of the proceeds of sale, applicable to the payment of debts as stated by the auditor, be inadequate for that purpose, the portion of the debts unsatisfied thereby (and no more) will bear the same interest which the credit part of the sales bear.

Let us now see what it is, that the Chancellor has decided by his decretal order of the 17th February, 1832, ratifying the audit, made under his order of the 11th of the same month, that we may ascertain how far injustice has been done to any of the parties interested.

He has decreed, that the appellee be paid not only the principal of his debt, with legal interest thereon from the day it became payable until the day of its payment, but that he be paid out of the trust fund, his principal and interest to the time of sale; with compound interest thence till the last audit; and interest on principal and interest thus compounded, from that date until paid. For this mode of computing interest under circumstances at all analogous to the present, we can find no precedent in any proceeding of courts of law or equity. It is an innovation upon the just, and long established practice of courts of equity before referred to, which this court cannot sanction. It could not be sustained, even if the entire sales had been on a credit bearing interest; because after the last audit, it would be allowing the creditor interest on a larger amount of principal than he had any title to; even on the hypothesis of his becoming from the day of sale, the creditor of the fund; which for him is the most favorable aspect in which his

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

rights can be regarded. Instead of receiving interest on \$3,815 50, the amount of debt, principal and interest, on the day of sale, he is allowed from the last audit interest on \$4,690 52.

But when we look at this order in reference to the facts before us, its hardship and injustice appear strikingly manifest. A considerable part of the proceeds of sale were in cash, all of which, with the exception of the expenses of sale and suit, belongs to the creditors; not a farthing of it had these distributees any power to receive. These creditors, after sleeping upon their rights for years and suffering their money to lie dead in the hands of the trustees, turn round upon the representatives of the debtor who have been in no default, and claim of them interest upon the creditor's money not received, and left unproductive by reason of their own negligence. A single illustration (if illustration be necessary) will demonstrate the injustice of such a procedure. The mortgaged estate of a debtor owing \$20,000, is sold under a decree of the Chancery court for \$25,000; \$20,000 of which is by the terms of sale, paid in cash, and on the remaining \$5,000 a credit of five years is given. The creditor suffers the \$20,000 to remain in the trustees' hands until the expiration of the five years' credit. According to the principles established by this order, he must be entitled to the whole \$25,000; and had he delayed to demand payment of his money for ten years, the debtor would have owed him, in addition to the \$25,000, a further sum more than \$5,000—Nay, had there been a few intermediate audits, and the interest compounded, as in this case, the balance against the debtor would have exceeded \$10,000. This order is still further liable to objection, because departing from the common form used in similar cases, as to the application of interest received, it directs the trustees to pay interest to the creditors, not out of, or in proportion to the interest by them received, but without reference to such receipt. Affirm then this order, and such payment of interest must be made by the trustees, notwithstanding the

Evan T. and Andrew Ellicott vs. Thomas Ellicott — 1833.

whole credit portion of the proceeds of sale may have been paid to them, on the 14th of January, 1832; and may ever since have been remaining idle in their hands, awaiting the final adjudication of this controversy. And this payment of interest, never received, is to fall upon whom? Upon the trustees? No. But upon the innocent distributees of *Elias Ellicott*.

If the unsatisfied debts are to bear interest, and interest compounded too, until paid, justice would dictate that when the cash part of the proceeds of sale were applied to the payment of any debt, that such payment should stop any further accrual of interest on the debt so paid. But in this case, after the debt has been fully paid off, with the cash proceeds of sale in the hands of the trustees, such debt is still decreed to continue to bear compound interest, to be paid by the distributees of *Elias Ellicott*. And for whose benefit? For the exclusive benefit of the trustees who paid the debt, with the funds of the distributees in their hands; the cash fund being *ex consequenti* theirs, from the mode in which the Chancellor has decreed payment to the creditors. If this be not considered by the appellees' solicitor cause of complaint to the distributees, it is difficult to conceive what would be so regarded.

The Chancellor erred too, in his order of the 11th February, 1832, in ruling good the exceptions of the appellee to the auditor's second statement; it being a departure from that uniform course of proceeding, which in similar cases, as we have before stated, has always prevailed in the Chancery court of *Maryland*.

The second ground upon which the reversal of these decretal orders has been resisted, we also deem untenable. A trustee, in his character as such, may, for the benefit of those interested in the fund, and who are aggrieved by an erroneous order for its payment or distribution, appeal to this court for redress.

This right we consider as having been recognized by

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

this court, in the case of *Kent vs. Alexander, trustee of Mullikin*, decided at June term, 1831.

We entertain the same opinion, as to the insufficiency of the appellees' third position. Even if the facts were true as alleged, that the trustees have so conducted themselves in the execution of their trust, as to become personally liable for interest, in the mode in which the Chancellor has charged it upon the trust fund; that question is not presented by the record, nor was it considered or decided by the Chancery court.

Before the trustees could be visited by such a penalty as that now attempted to be inflicted upon them, they must be notified of that of which they are accused, that an opportunity may be afforded them of showing their innocence. To sustain the decision of the Chancery court, would be to condemn them unaccused, and unheard. Not even an intimation was given to the trustees that they were held answerable for interest; or that on account of their misconduct the rights of the appellee to interest, had been in the slightest degree varied. No bill or petition to that effect, has been filed against them. Not the most remote insinuation of the kind is to be found in the exceptions. The claim of interest is preferred solely upon the grounds that the estate of the deceased is solvent; that the distributees are entitled to no interest until creditors are fully paid.

Seeing that the decretal orders appealed from must be reversed, it is incumbent upon this court to decree such a distribution of the deceased's estate, as ought to have been made in the Chancery court. For this purpose there must be a new audit as regards the questions of interest since the sale. Neither that made by the auditor without the Chancellor's instructions, nor that made with them, being consistent with the rights and equities of the parties. To enable the auditor to make such a statement as will meet our approbation, we will suggest the outlines of the account which ought to be stated. The items of the first audit should be assumed as correct, save one, the nature and operation of

Evan T. and Andrew Ellicott vs. Thomas Ellicott.—1833.

which we shall hereafter notice. The commissions allowed to the trustees should be deducted from the cash part of the proceeds of sale; the residue whereof shall be in due proportions, applied in payment of all those entitled to claim under that audit, except the distributees and trustees. The balances then due all such claimants shall bear interest until the time when the trustees first paid off a creditor. From that period the balance of the creditor so paid off, which bore interest, shall continue to bear interest for the benefit of the other claimants, in proportion to their respective claims; or in other words, shall be proportionably distributed amongst other claimants; their cash in the hands of the trustees having been applied to its payment, they shall, to that amount be subrogated to the rights of the satisfied creditor; and at every subsequent payment of a creditor by the trustees, the same process shall be adopted in adjusting the rights of the remaining creditors, until the whole cash fund shall be exhausted; after which the unpaid creditors will be entitled to interest upon the amount of their debts, as ascertained by the auditor in his first report, up to the time when the credit portion of the sales is received by the trustees.

Should it appear that the trustees, in their payments, have exceeded the cash by them received, to the amount of that excess, they will be substituted to the rights of the creditors paid off; and thenceforward should be allowed interest on that amount of the creditor's principal debt so prematurely paid off. And they should also be allowed the interest on such principal debt thus advanced, by their payment in anticipation; which they will be reimbursed, but without any interest thereon, when the interest is collected on the credit portion of the sales. The principal debt of each creditor, it must not be forgotten, with the exception mentioned, is the amount of principal and interest, ascertained to be due him by the auditor's first statement.

In making the audit we require the auditor will conform to the principles we have before stated for his government,

except as regards the mortgaged debt due to the executors of *Andrew Ellicott*. The amount paid in satisfaction thereof by the trustees, must be credited to them, and deducted from the purchase money, for which the mortgaged premises were sold to *John Ellicott*; so that from \$8,350, the cash part of the proceeds of sales, there should be subtracted the sum of \$4,740, the principal and interest of the mortgaged debt paid by the trustees; thus leaving a balance of the cash fund of \$3,610, to be distributed in the manner hereinbefore pointed out. The reason why this claim of *Andrew Ellicott's* executors is to be distinguished from other debts due by *Elias Ellicott*, is, that they were not bound to come in and seek payment under the proceedings of the Chancery court, for the sale of the deceased's real estate, but might cling to the property specifically pledged for the payment of their debt, and hold on until they were fully paid both principal and interest. If the interest paid were greater than would have been allowed, had they come in as creditors under the proceedings in Chancery, the burden should be cast on the estate of *Elias Ellicott*, and no part of the loss be visited on his creditors. By the settlement proposed, the creditors receive every thing that in justice they can demand; and the distributees are left without diminution, in the enjoyment of every thing to which in equity they are entitled.

The principle adopted by the auditor of the court of Chancery, in his second account, in the distribution of the interest received by the trustees, we cannot sanction. The debts were paid by them out of the trust fund in their hands. They are entitled to none of the advantages of equitable substitution. Their acts cannot enure to their individual benefit, but to the benefit of those to whom the fund by them appropriated belongs. If they have paid to any creditor more interest than he was authorised to receive, the fault is their own, and they must bear the loss.

DECREE REVERSED WITH COSTS IN THIS COURT.

ROBERT RIDGELY vs. MICHAEL IGLEHART, December, 1833.

The real estate of W not admitting of division, was sold by commissioners under the act of 1820, *ch.* 191. One of the heirs of law became the purchaser, and not paying his bond for the purchase money, was sued by another of the heirs, who obtained judgment at law and sold the land. A third heir who had not been paid, now filed his bill to enforce the lien for his portion of the proceeds, under the act of 1820. This bill was against the purchaser alone.—**HELD**, that the court had jurisdiction to enforce this lien; that the bond given under the act of 1820, need not be sued upon; that all the heirs of W were interested, and should be made parties; and to make proper parties the cause must be remanded to Chancery.

APPEAL from the court of Chancery.

The present bill was filed by the appellant, on the 20th of November, 1831, and the case made by it is sufficiently stated by the learned judge who delivered the opinion of this court.

The appellee demurred specially. 1. That the bill contained no matter of equity whereon a decree could be grounded, or upon which any relief could be granted against the defendant. 2. That if the matters stated, do give the complainant any cause of complaint or action against the defendant, the same is triable, and determinable at law, and ought not to be inquired of by this court. 3. That the State of *Maryland* is, by the complainant's own showing, a proper and necessary party to any suit or action in this court, touching the matters alleged in the bill; and that the heirs at law of *William Ridgely* in said bill named, are likewise proper and necessary parties thereto.

Bland, Chancellor, at July term, 1832, dismissed the bill with costs, and thereupon the complainant brought the record by appeal to this court.

The cause came on to be argued before **BUCHANAN**, Ch. J., and **EARLE**, **MARTIN**, **STEPHEN**, **ARCHER**, and **DORSEY**, J.

Boyle, for the appellant, contended,

1. That the claim of the complainant constituted a lien on the land in question, which a court of Chancery would enforce. He referred to the acts of 1802, *ch. 94, sec. 2*; 1820, *ch. 191, sec. 20, 21, 22. 4 Gill and Johns. 480.*

2. That the objection as to the want of parties was not well taken. The State of *Maryland* has no possible interest in the subject of the controversy, and therefore need not have been before the court, and as each of the heirs of *William Ridgely* have distinct and separate interests, there is no necessity for uniting them in the same suit. If, however, they should be considered as necessary parties, this court may send the case back to have the proper parties made. *Act of 1818, ch. 193, sec. 14. 1832, ch. 302, sec. 6.*

Alexander, for the appellee.

1. Before the complainant can proceed to recover any part of the money, he should have procured from the court in which the proceedings of the sale of the land took place, an order, directing a certain proportion of the money to be paid to him, as otherwise the court in which he sues cannot know how much he ought to recover. The court in which the proceeding originated had the jurisdiction, and chancery could not interfere. *Brown vs. Wallace, 4 Gill and Johns. 509.*

2. The cause of action, if one existed at all, was a legal, and not an equitable one. The lien spoken of in the act is a legal one merely. When the bond was given, the equitable lien was gone. *Richardson vs. Jones, 3 Gill and Johns. 163.*

3. It was necessary to have made the State a party. The State is a trustee for the benefit of the parties concerned, and the act directs, that a suit at law may be brought in the name of the State for their use. If a suit may be brought in Chancery upon the bond, the name of the State must be used.

4. The heirs at law of *Ridgely*, the intestate, were likewise necessary parties, and more especially *Reuben Ridgely*, under whom *Iglehart* purchased; as he stands in the relation of a surety to him, and had a right to have him before the court to aid in the defence, and to have by the same decree a remedy against him, if he (*Iglehart*) should be compelled to pay the money. But the proceeding being intended to affect the subject of the incumbrance, it was indispensable that all the incumbrances should be before the court. 1 *Cox*, 352. 1 *Simons and Stewart*, 105. 6 *Johns. Ch. R.* 450. 1 *Peters' Con. Rep.* 215.

BUCHANAN, Ch. J., delivered the opinion of the court.

Reuben Ridgely, one of the heirs at law of *William Ridgely*, deceased, having purchased from the commissioners appointed under the act of 1820, *ch.* 191, relative to descents, the real estate of *William Ridgely*, which would not admit of division, and having given his bond to the State pursuant to the provisions of the act, conditioned for the payment to the other heirs of their respective proportions of the purchase money, the land was afterwards sold under a judgment at law obtained against him upon his bond, for the payment of the portion of one of the heirs; and this bill was filed by another of the heirs of *William Ridgely*, against the purchaser alone under the judgment, to subject the same land to sale for the payment of his proportion, and was dismissed by the Chancellor.

On the part of the appellee it has been contended, that there is no cause of action, no order appearing by the court, in which the proceedings were had for a division of the estate, designating the proportions of the amount for which the estate was sold, to which the heirs were respectively entitled. But that objection is rather too technical and attenuated.

It is not very clear, that the words in the 22d *sec.* of the act of 1820, *ch.* 191, "agreeably to the order of the court," were intended to relate to the proportions, to which each of the heirs might be entitled; but may have been intended to

be applied to the giving a bond to the State, instead of one to each of the heirs, which, by the same section is authorised to be done under the direction of the court.

But admitting it to be otherwise, such an order may have been made by the court, and would be proper evidence before the auditor in stating an account between the parties ; and if no such order was given, no injury could accrue to the party, since the proceedings under the petition for a division of the estate shows the amount for which the land was sold, and to be divided between the several heirs. And if the expenses allowed by the county court, attending the proceedings under the petition, were paid by the appellee, he would be allowed for them in an account taken by the auditor.

Chancery would never suffer the mere absence of such an order, as is supposed to be necessary, to work so serious a mischief, as the destruction of the obligation of the bond, where no injury can arise to the party from the omission of it.

The supposition that the State should have been made a party has no better foundation. The State has no manner of interest in the matter. A suit at law upon the bond would necessarily be in the name of the State for the use of the party prosecuting the action. But by the act of Assembly under which the bond was given, it is declared to be a lien upon the land ; and this is a proceeding not upon the bond, but a proceeding *in rem* to enforce the lien created by the act.

It is however, contended, that the action should have been at law upon the bond, and that the remedy at law must be exhausted before recourse can be had to the land. But that is entirely a mistake ; the purchase money for which the bond was given, is made by the act of Assembly a specific lien on the land ; as much so as if a mortgage had been given on the land for the money intended to be secured by the bond ; and a party entitled to a proportion of that money, has his election to prosecute either his remedy

at law upon the bond, or to go into equity to enforce his lien on the land; as much so as in the ordinary case of a bond for the payment of money, accompanied by a mortgage of land as a collateral security.

And the circumstance, that in this case the land has passed into the hands of a sub-purchaser, makes no difference; he purchased it subject to the lien, and may have regulated his price accordingly. A court of Chancery will not turn from its door, a party coming to have enforced his lien so expressly created, merely to drive him to proceedings at law against a security; which may prove fruitless, and lead to vexatious and useless circuitry of action.

The solicitor for the appellee has invoked the aid of *Richardson vs. Jones*, 3 Gill and Johns. 163, to sustain him on the ground upon which he has planted himself. But if he had examined that case with his accustomed accuracy, he would have found it to advance no such principle. The doctrine of that case is, that when a purchaser at a trustee's sale has completed his purchase, and complied with the terms of sale by giving his bond as required by the order of sale, the payment of it cannot be enforced in Chancery in a summary way by an order to bring the money into court; nor by a bill in Chancery to enforce the specific performance of it, as a mere bond for the payment of money. But that the remedy on the bond as such is by a suit at law. But there is no intimation that, in such a case as the present, there may not be proceedings in Chancery against the land to enforce the equitable lien, without first going into law on the bond.

This objection to the want of proper parties is better taken. It is a general rule in Chancery, that all persons having an interest in the subject matter of the suit, should be brought before the court, in order that a termination may be put to all controversy in relation to their different rights by one suit, if it can be done.

In this case all the heirs of *William Ridgely*, deceased, are interested, and should be made parties, to prevent de-

Joice and Wife vs. Taylor.—1833.

ception and embarrassment to purchasers, by the extent of the liens being made known by the pleadings; and also to prevent a sacrifice piecemeal of the property, by sale after sale, under separate and distinct proceedings by the several heirs, with a great and ruinous accumulation of costs; and that there may be a decree upon the whole case, as far as it can be done, settling the rights of all who are interested.

THE CAUSE THEREFORE WILL BE REMANDED TO
THE COURT OF CHANCERY.

JOICE and WIFE, *et al.* vs. ELIJAH TAYLOR.
December, 1833.

When a mortgage is obtained by the misrepresentation of the mortgagee, it is void; and it is immaterial as to its legal effect upon the instrument, whether the mortgagee at the time he made the misrepresentation knew it to be false. If he made a statement of facts, knowing it to be false, it would clearly be a legal fraud; but although he did not know that it was false, yet, if he undertook to state it to be true, without a knowledge of its truth or falsehood, and it operated as a deception to the other party to whom it was made, and thereby induced the mortgage, it would avoid it. The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the statement made as true, was believed to be true, and therefore, if false, deceived the party to whom it was made.

An allegation in a complainant's bill, though not denied, if material to the case, must be proved at the hearing.

APPEAL from the court of Chancery.

The present bill was filed on the equity side of *Baltimore* county court, by the appellants, *Joice* and wife, and *Stephen Severson* and *Sarah* his wife, formerly *Sarah Joice*, on the 29th of September, 1830, and afterwards removed to the court of Chancery. The complainants alleged, that in the year 1827, *Joice* and wife conveyed a tract of land, which the wife had inherited from one *Raven*, to *Sarah Joice*, before her intermarriage with *Severson*, with the

design that the said *Sarah* should hold the property so conveyed in trust, for the separate use and benefit of *Mrs. Joice* her mother, who was also entitled to a portion of the personal estate of the said *Raven*. That *Taylor* the appellee, was one of the executors of said *Raven*, at the sale of whose personal estate the said *Joice* and wife purchased a number of articles. That upon the representations of *Taylor*, that a mortgage of the property so conveyed in trust for *Mrs. Joice* to secure the payment of the articles purchased at *Raven's* sale, was necessary to enable him to settle his account with the Orphans court, she agreed that one might be executed by the trustee, *Sarah*, which was accordingly done on the 31st of October, 1827; the said *Taylor* then assuring her, that as soon as he completed the settlement of *Raven's* estate, he would pay her, her proportion thereof, and surrender the mortgage. That *Taylor* has been guilty of abuses and frauds as the executor of *Raven*, and holds money in his hands belonging to said estate, more than sufficient to pay the mortgage debt, notwithstanding which, he has caused the mortgaged property to be advertised for sale, under a decree of foreclosure obtained without making *Mrs. Joice*, the *cestui que trust*, a party to the suit. The prayer of the bill was for an injunction to prevent the sale, that the decree of foreclosure might be annulled, the mortgage declared null and void, and for general relief.

The answer alleged that the deed from *Joice* and wife to *Sarah* was absolute upon its face, and the defendant denied all knowledge that it was designed to create a trust for the benefit of *Mrs. Joice*. That it purports to be for natural love and affection and of the sum of five dollars, and is in effect a deed of gift to the said *Sarah*, who is the daughter of the grantors, as appears by the recitals of the deed which is exhibited with the answer. That *Joice* and wife having purchased various articles at the sale of *Raven's* estate, (upon which letters testamentary had been granted the

Joice and Wife vs. Taylor.—1833.

defendant) amounting to \$423 22, and *Joice* being subsequently desirous of borrowing a further sum of money from him, he the defendant consented to lend him, and did lend him the same, upon the condition that he should receive a mortgage of the property conveyed as aforesaid to *Sarah*, to secure the whole amount so due the defendant. That accordingly in October, 1827, *Joice* and this defendant came to a settlement of their accounts, when the balance due him from *Joice*, including his purchases at *Raven's* sale, and subsequent advances of money, was found to amount to \$650, for which sum *Sarah Joice* gave her note, and at the same time made and delivered to this defendant the before mentioned mortgage, to secure the payment thereof. The answer admitted that *Mrs. Joice* was entitled to a portion of *Raven's* personal estate, but denied that the defendant agreed that her proportion thereof should be set off or discounted from the amount purchased as aforesaid by *Joice* and wife at the sale. That the defendant having in his settlements with the Orphans court charged himself with the amount of these purchases, and having as aforesaid procured the mortgage for his security, did promise *Joice* and wife, that if upon the final settlement of *Raven's* estate any thing should be due her, it should be set off against the mortgage debt, and if sufficient to cover the whole claim, the mortgage should be surrendered. That the whole of *Raven's* personal estate however, has been exhausted in the payment of debts, and the mortgage remaining wholly unsatisfied, he filed a bill, and obtained a decree of foreclosure and order to sell, against the mortgagor alone, upon the ground that she only is interested.

A commission issued, and a great many depositions were taken and returned, which, as it would not be possible to condense them within reasonable limits, the reporters think it advisable altogether to omit.

Bland, Chancellor, at July term, 1832, dismissed the bill with costs, when the complainants brought the record by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Learned and Johnson, for the appellants, cited 16 *Ves.* 115. 4 *Bro. P. C.* 198. 2. *Sch. and Lef.* 474. 2 *Swan.* 73. 1 *Sch. and Lef.* 209. 1 *Bro. P. C.* 308. 2 *Ch. Dig.* 1341. 1 *Stark. Ev.* 121. 19 *Ves.* 433. 2 *Stark. Ev.* 757.

T. P. Scott, for the appellee, referred to 4 *Gill and Johns.* 427, 443. 6 *Harr. and Johns.* 28-9, 445. 3 *Gill and John.* 38. 4 *Ib.* 460.

MARTIN, J. delivered the opinion of the court.

The bill in this case was originally filed in *Baltimore* county court on the 29th of September, 1830. Injunction was granted by that court, and the answer of the respondent and several exhibits filed by him, and a motion made to dissolve the injunction *nisi*, when the cause on the suggestion and affidavit of *Elisha Joice*, one of the complainants, was removed to the court of Chancery. At December term, 1830, the injunction was dissolved by the Chancellor, and at July term, 1831, a commission was issued to take testimony.

The bill states among other things, that a mortgage had been executed by *Sarah Joice*, now *Sarah Severson*, to *Elisha Taylor* for certain lands therein mentioned, and that upon the application of the mortgagee, a decree had been obtained in *Baltimore* county court to foreclose the mortgage and sell the land, to pay the sum it was intended to secure. That the mortgagor had no equitable right to make the mortgage. That the lands were held by her in trust for her mother, and that the mortgage was obtained from her by fraud, and the misrepresentations of the mortgagee, in whom great confidence was placed, and by whom they were greatly deceived and misled, &c.

Joice and Wife vs. Taylor.—1833.

If the allegation in this bill, that the mortgage was obtained by the misrepresentation of the respondent, is established by proof, it would render the deed void; and it is immaterial *as to its legal effect upon the instrument*, whether the respondent at the time he made the representation knew it to be false. If he made a statement of facts, knowing it to be false, it would clearly be a legal fraud; but although he did not know that it was false, yet if he undertook to state it to be true, without a knowledge of its truth or falsehood, and it operated as a deception to the other party to whom it was made, and thereby induced the mortgage, it would avoid it. The *gist* of the inquiry is, not whether the party making the statement *knew* it to be false, but whether the statement made as true was believed to be true, and therefore, if false, deceived the party to whom it was made.

In the examination of this case the attention of the court is necessarily called to the answer of the respondent, and the caution adopted by him in answering, or rather avoiding to answer the allegation of his misrepresentations, is too obvious to be passed in silence. The allegation is in substance, that *Elizabeth* the mother was entitled to all the real estate, and one-third the personal estate of *Isaac Raven* deceased. That her husband, *Elisha Joice*, had purchased articles at the sale of *Raven's* estate, from *Taylor* the executor. That *Taylor* in order to obtain a mortgage on the lands of the wife, to secure the payment of the debt due from the husband, represented that the mortgage was only intended to enable him to settle up *Raven's* estate with the Orphans court, and that as soon as that settlement was made, he would pay over to *Elizabeth Joice* the portion due to her, by which the mortgage might be redeemed. The respondent answers fully all the minor allegations in the bill, and what does he say to the important charge of misrepresentation? He admits, "at the time of the execution and delivery of the mortgage, he did promise and assure the said *Joice* and wife, and *Sarah Severson*, that if

upon the final settlement of the personal estate of *Isaac Raven* deceased, there would be any thing due unto *Elizabeth Joice*, that then he would set off the amount that might be so due against the said promissory note, and give up the said mortgage in case the said note was paid." *There he stops.* He does not deny that he stated to them, the mortgage was necessary for him to settle with the Orphans court, and that upon that settlement, *Elizabeth Joice's* portion should be paid, with which she might redeem the mortgage; and yet that representation is the ground relied on by the complainants for relief. He therefore evades a direct answer to the allegation, and only states facts which may be true, although he may also have made the representations attributed to him. This allegation however, although not particularly denied by the respondent, must be proved by the complainants to sustain their cause.

The court has carefully examined the testimony contained in this record, and without the aid of *Sarah Severson's* evidence, (the objection to which was not considered, because there was sufficient evidence from other witnesses,) is compelled to the conclusion, that there has not been fair dealing on the part of *Taylor* in this transaction. The consideration of this mortgage, appears from the statement or account delivered by *Taylor* to *Israel* as directory to him in preparing the mortgage. By that account it appears the principal item of the consideration was the sum of \$423 22 $\frac{1}{4}$, due from *Elisha Joice* to *Taylor*, for articles purchased at the vendue. That *Taylor*, at or about the time the mortgage was executed, represented to *Mrs. Joice* that she would be entitled to receive from the estate of *Raven*, a larger sum than the consideration mentioned in the mortgage, is clearly proved both by *W. W. Waite* and *Francina A. Joice*. *Waite* deposes to the further fact, that *Taylor* stated the mortgage was a mere matter of form, there being more money due from the estate of *Raven* than would pay it, but that it was necessary to have the mortgage to settle

Salmon vs. Feinour.—1833.

the estate with the Orphans court. *Mrs. Joice* had unlimited confidence in *Taylor*, and no doubt believed the statement thus made by him, and under that belief, that the mortgage was a mere matter of form to enable *Taylor* to settle his account with the Orphans court, and would immediately be discharged by the money to be paid to her, she was induced to agree to its execution. It cannot be credited from the facts disclosed in this record, that *Mrs. Joice* would have consented that *her land should be sold* to pay the debt due from her husband to *Taylor*. Her husband was embarrassed, and she was desirous to protect this real property from his creditors, and to reserve it for her own separate use.

The court is of opinion that this mortgage was obtained by the false representation of *Taylor*, and is fraudulent and void.

DECREE REVERSED WITH COSTS, THE INJUNCTION MADE PERPETUAL, AND THE MORTGAGE DECLARED TO BE NULL AND VOID.

CHARLES SALMON vs. CHARLES FEINOUR.—*December,*
1833.

A witness cannot be permitted, upon the mere exhibition of an account to him at the trial, or under a commission, to swear that he believes the account to be correct, and the goods mentioned in it were sold to B, by the plaintiff, upon the faith of a letter of credit given by the defendant, though the letter had then been given in evidence to the jury.

A mere inquiry into the belief of a witness, which may have no other foundation than hearsay, is not competent. With respect to the belief or persuasion of a witness, founded on facts within his own knowledge, it is otherwise. On questions of identity of persons and hand writing, it is the common and prudent practice of witnesses to swear to their belief only, which is always admitted.

Salmon vs. Feinour.—1833.

APPEAL from *Anne Arundel* county court.

This was an action of *Assumpsit*, brought by the appellant against the appellee, on the 23d *January*, 1828, for the price of merchandize, alleged to have been sold and delivered by the plaintiff to one *Mary Ann Brien*, upon the faith of the defendant's letter of credit.

Issue was joined upon the plea of *non assumpsit*. A commission was sent to *Philadelphia* to take proof, and in answer to one of the plaintiff's interrogatories, a witness deposed, "that she believes that the account sales now shown to her, (and marked B) to be correct, and that the goods therein mentioned were sold to *Mary Ann Brien* by *Charles Salmon*, on the faith of *Charles Feinour's* letter of credit above referred to, which was shown to *Charles Salmon*."

This answer the defendant objected to as inadmissible testimony, and the court [DORSEY, Ch. J., and KILGOUR, and WILKINSON, A. J's.] sustained the objection. The plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN Ch. J. and MARTIN, STEPHEN, and ARCHER, J.

Boyle, for the appellant, cited *Stark. Ev.* 127.

A. C. Magruder, for the appellee.

The question to be decided was a question of fact, which has nothing to do with the belief of a witness.

BUCHANAN, Ch. J., delivered the opinion of the court.

It cannot be doubted that the opinion, to which the exception in this case was taken, is correct.

If the witness in her examination in chief had been asked, if she believed the account shown to her was correct, and if she believed the goods therein charged were sold by the plaintiff to *Mary Ann Brien* on the faith of *Feinour's* letter of credit to her, it is very clear that she

would not have been permitted to answer the questions, being entirely an inquiry into her belief of a matter in relation to which, the belief or persuasion of a witness (which may have no other foundation than the merely having heard it) is not competent testimony. Her answer therefore, that she believed the account to be correct, and that the goods were sold by the plaintiff to *Mary Ann Brien* on the faith of *Feinour's* letter of credit, in reply to the interrogatory, whether the goods were in fact so sold to *Mary Ann Brien*, and not whether she believed it, must be equally inadmissible; though if she had sworn to the fact, as of her personal knowledge, her means of knowing the fact, might upon cross examination have been inquired into, and the accuracy of her testimony thus tested.

With respect to the belief or persuasion of a witness, as founded on facts within his actual knowledge, it is otherwise. On questions of identity of persons and of hand writing, it is the common and prudent practice of witnesses to swear to their belief only, which is always admitted.

This too, it will be observed, is the testimony of a witness taken under a commission and offered at the trial, when the opportunity of a further or cross examination was cut off; and if admitted, would have gone to the jury as the mere declaration of her belief, that the account was correct, and that the goods therein charged were sold by the plaintiff to *Mary Ann Brien*, on the credit of the letter of credit to her, from the defendant. Had she after having testified to the fact, that she had purchased sundry goods from the plaintiff in the name and at the request of *Mary Ann Brien*, sworn to her belief, that the goods charged in the account shown to her were the same goods, it would have presented a different question.

But there is nothing to show, that the declaration of her belief that the account was correct, &c. had any reference to the goods that she had purchased as the agent of *Mary Ann Brien*.

Crawford vs. Berry.—1834.

THOMAS B. CRAWFORD vs. ZACHARIAH BERRY.—June, 1834.

In a suit by the assignee of a single bill against the assignor, the obligee, on the failure to pay by the obligor, and on the question of due diligence by the assignee in pursuing the obligor, the admissibility of parol evidence of the notorious insolvency of the obligor cannot be questioned. It may also be proved by other evidence, such as a discharge of the obligor under the insolvent law, or the return of *nulla bona* to a *fieri facias* sued out on a judgment obtained against him on the single bill.

B sold C certain oxen, and received on account of that sale an assignment of a single bill executed by M to C. B brought suit against M on the single bill to the next succeeding term of the court, and obtained a judgment in regular course by confession, with a stay of execution for thirty days. He afterwards sued out a *ca sa* which was returned *cepi* and entered, not called by consent of parties.—HELD, that if M had been notoriously insolvent at the time of the assignment, or had become so before the first term of the court after the assignment, there would have been no obligation on the assignee B to have sued him; and that if M was insolvent at the time of the rendition of the judgment, and no loss had arisen from the stay or entering the execution not called by consent, no *laches* could be imputed to the assignee of the single bill.

The court in refusing to grant the defendant's prayer, that for certain specified reasons the plaintiff is not entitled to recover, ought not to go further and assume that the parol evidence of the plaintiff necessarily establishes his claim, for that would be an encroachment on the province of the jury.

Where a vendor of chattels accepts from the vendee the single bill of a third person on account of his purchase money, he is bound to use active diligence in pursuing the obligor for a recovery of the sum due on the bill, so that nothing should be lost by the *laches* of the vendor.

APPEAL from Prince Georges county court.

This was an action of *Assumpsit*, brought by the appellee against the appellant, to recover the price of certain cattle sold and delivered by the plaintiff to the defendant, and on account of which, the defendant on the 12th July, 1827, assigned to the plaintiff the single bill of a certain *John A. Magruder* for \$175, dated January 12th, 1825, payable six months after date.

Crawford vs. Berry.—1834.

The declaration contained three counts. 1st, a special count on the assignment. 2nd, an *indebitatus assumpsit* for the price of the cattle; and 3d, a *quantum valebat*. Issue was joined upon the plea of *non-assumpsit*.

1. At the trial of the cause, the plaintiff to support the issue joined on his part, swore to the jury *Edward W. Belt*, formerly sheriff of the county, by whom he offered to prove, that *John A. Magruder* mentioned in the plaintiff's declaration, was wholly insolvent on or about the month of October, 1828, and has so continued up to the present time. To the admissibility of this testimony the defendant by his counsel objected, on the ground that the fact of the insolvency of the said *John A. Magruder* could only be proved in the present action, either by the production of the record of his regular discharge as an insolvent petitioner, or a certificate thereof, or by showing that a *fi fa* had issued on said judgment, which had been returned *nulla bona*; but the Court (KEY, and DORSEY, A. J.) permitted the testimony of the said *Edward W.* to go to the jury. The defendant excepted.

2. The plaintiff then proved to the jury, that on or about the 12th July, 1827, the plaintiff sold and delivered to the defendant certain oxen for the sum of \$175, and on the same day received from the defendant on account of said purchase an assignment of a single bill executed by one *John A. Magruder*, to the said defendant for the sum of \$175, which said single bill and assignment are in the following words, to wit.

"\$175. Six months after date, I promise to pay *Thomas B. Crawford* or order, one hundred and seventy-five dollars, for value received of him, with legal interest thereon from date, witness my hand and seal this 12th day of January, 1825. *John A. Magruder*. (Seal.) (Endorsed.)"

"I hereby assign all my right, title, and interest, in and to the within note to *Zachariah Berry*, for value of him received.
T. B. Crawford."

12th July, 1827.

He then read in evidence to the jury, the record and proceedings of a suit brought to the October term of this court in the year 1827, on the single bill aforesaid, and which was prosecuted to final judgment at October term 1828.

The defendant then on his part, proved to the jury by an entry on the docket of said court, that the said judgment was rendered subject to a stay of execution for thirty days, and also read in evidence the *ca. sa.* issued on said judgment, and the return, &c. thereon, from which it appears that to the April term of said court in the year 1829, the said *ca. sa.* was returned "*cepi*," and had been entered, "not called by consent of parties." The plaintiff then offered to prove by a competent witness, that at the time of the rendition of the judgment, and continually afterwards up to this time, the said *John A. Magruder* had not property which could be levied on, and was totally insolvent.

Whereupon the defendant by his counsel prayed the court to instruct the jury, that the plaintiff in this action was not entitled to recover. 1. Because from the testimony aforesaid, it appeared that the plaintiff had consented to take the said judgment, subject to a stay of execution for thirty days. 2. Because the *ca. sa.* which issued thereon had been entered, not called by consent of parties; which instruction the court refused to give; but were of opinion and so instructed the jury, that if they should find from the evidence in this cause, that at the time of the rendition of the judgment, and the said return of said execution and entering the same "not called," the said *Magruder* was insolvent and incapable of paying his debts, and has continued so ever since, that the plaintiff was entitled to a verdict for such sum as they shall find due from the sale of the oxen aforesaid. The defendant excepted, and the verdict and judgment being against him, he brought the present appeal.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

Alexander, for the appellant.

The first exception is abandoned. Upon the second he contended, that the stay of execution allowed on the judgment against the said *John A. Magruder*, and the entry of the *ca. sa.* "not called," would have released the appellant from his responsibility to the appellee, if even he had assumed any, and the instruction prayed for by the appellant as stated in the second exception, ought to have been granted. *Act of 1763, ch. 23, secs. 9, 10. 2 Bro. Ch. C. 579. Theobald, 75. 2 Cox, 63. 2 Swanst. 185, 189.*

2. That although the court may have done right in refusing the instruction prayed for by the appellant, still the direction which was actually given to the jury was erroneous, inasmuch as every fact essential to the plaintiff's right to recover, except the insolvency of *Magruder*, is assumed by the court, instead of being submitted to the jury as they should have been. There is nothing in the record to show that the defendant was to pay cash for the oxen, if the paper assigned proved to be bad. Nothing to show that he guarantied it to be good, or that the plaintiff was not willing to receive it in payment, and it was not competent to the court to assume that the defendant had come under any such engagement.

T. F. Bowie, for the appellee.

Every assignment of negotiable paper (as a bond or a single bill is in this State) imports a valuable consideration, and will subject the assignor to an action of general *indebitatus assumpsit* at the suit of the assignee, in case the bond is not paid by the obligor. This doctrine is supported by the clearest principles of the common law, and has not been affected by the act of 1763, *ch. 23*. That act, so far as it regards the liability of the assignor to his imme-

diate assignee, is merely declaratory of the common law, and only changes the common law so far as it gives to the assignee of a bond the right to sue in his own name the obligor, which the assignee could not do before. Prior to the statute of 3d and 4th *Ann*, by which promissory notes were made negotiable, it was held that at common law the endorser of a promissory note was liable to his immediate endorsee, if the note was not paid by the maker, upon the principle that the endorsement imported a valuable consideration paid, which, of itself, would support general *indebitatus assumpsit*—*Ld. Raymond's Reps.* 443. *Kyd on Bills*, 109. And no distinction in this respect exists at common law between promissory notes and bonds. *Mackie vs. Davis*, 2 *Wash. Rep.* 219. *Norton vs. Rose*, 2 *ib.* 233. *Goodall vs. Steuart*, 2 *Hen. and Mun.* 105, 113, (*note.*)

But it has been said that the assignee must use due diligence against the obligor before he can resórt to the assignor for payment. The question of due diligence is for the court to decide under all the circumstances of each case. *Boyer vs. Turner*, 3 *Harr. and Johns.* 285. And it is sufficient for the assignee to show that the obligor was *unable* to pay the debt, or that some other thing or casualty happened whereby he was unable to receive or recover the debt from the obligor. 3 *Harr and Johns.* 287. If the obligor becomes insolvent recently after the assignment, it is not necessary for the assignee even to bring suit. *Goodall vs. Steuart*, 2 *Hen. and Mun.* 114 (*note.*) And whenever any degree of laches or neglect is imputed to him, it is a sufficient answer for him to show that due diligence would not have altered the case. *Ib. note* (1.) There is nothing in the record to show that *Berry* agreed to give *Magruder* a stay of execution for thirty days. The stay was entered by the order of the court, and it will be presumed that it was done in conformity with the established usage of the court. If the judgment however had been rendered without the stay of execution, the case would not have been altered, as the proof clearly shows, that *Magruder* had no property of any de-

Crawford vs. Berry.—1834.

scription to be reached by a *fieri facias*, and being totally insolvent, no injury was done to the assignor, and none of his rights affected. The same observations may be applied to his entering the *ca. sa. not called by consent*. A different course would not have rendered the execution available, and the law will not require a man to do that which would be nugatory and fruitless. Such a policy of the law would produce a severe and rigorous prosecution against all assignors, without the slightest probability of arriving at any useful or wholesome result.

The argument of the appellant's counsel, that the assignor is to be held in the light of a security for the payment of the bond, and that therefore any indulgence or extension of time to the obligor whom he regards as principal, will release the assignor, is not applicable to the principles of this case. As between the assignee and assignor, the latter is clearly the principal, it is with him that the assignee deals exclusively; upon his faith and credit alone the bond is purchased. The circumstances of the obligor are not known to the assignee, and there is no privity whatever between them. From the entire absence of such essential requisites to constitute the relation of *principal*, it is difficult to understand how the obligor in a bond can be regarded in the light of principal to the assignee. *2 Wash. Rep. 231.*

The objection taken to the right of the appellee to recover, on the ground that the assignment was not made according to the provisions of the act of 1763, *ch. 23, sec. 10*, cannot now be urged in this court. The objection was not raised in the court below, and the record presents no such point to this court; *act of 1825, ch. 117*; but even if the objection had been raised in the court below, the appellee's right to recover upon the second and third counts in the declaration would have been unimpaired, and the court below were right in so instructing the jury. The acceptance of a note or bill of a third person for a pre-existing debt, is no payment or extinguishment of said debt, and the original

Crawford vs. Berry.—1834.

cause of action remains in full force. *Glenn vs. Smith*, 2 Gill and Johns. 494. *Insurance Company vs. Smith*, 6 Harr. and Johns. 166. And it is difficult to discover any real and sensible distinction in this respect between promissory notes and bills, and bonds or other sealed instruments. For all the purposes of a present real security for a debt, the one is as available and effectual as the other, and although a bond or single bill is considered in the eye of the law as of a higher nature or security than a promissory note, yet this distinction exists only in the *technical rule* of law, and has no foundation in common sense, or in the practical present effect, and operation of such instruments.

BUCHANAN, Ch. J., delivered the opinion of the court.

The first exception has been abandoned in argument by the counsel for the appellant, and properly abandoned.

The suit is by the assignee of a single bill against the assignor, the obligee, on the failure to pay by the obligor; and on the question of due diligence by the assignee in pursuing the obligor, the admissibility of parol evidence of the notorious insolvency of the obligor cannot be questioned. Not that it might not be proved by other evidence, such as the discharge of the obligor under the insolvent law, or the return of "*nulla bona*" to a *fi fa* sued out on a judgment obtained against him upon the single bill by the assignee.

The question presented by the second exception is of a different character. The evidence is, that on the 12th of July, 1827, the appellee sold and delivered to the appellant certain oxen for the sum of \$175, and on the same day received from the appellant, on account of that purchase, an assignment of a single bill executed to the appellant by *John Magruder* for \$175, upon which the appellee brought suit against the obligor to the next succeeding term of the *Prince Georges* county court, and obtained a judgment in the regular course, with a stay of execution entered upon the docket for thirty days. He afterwards sued out a *capi-*

as ad satisfaciendum, which was returned by the sheriff “*cepi*,” and entered on the docket “not called by consent of parties,” and that at the time of the rendition of the judgment, and continually afterwards, *Magruder*, the obligor, had no property that could be levied upon, and was totally insolvent.

Upon this evidence the counsel for the appellant prayed the court to instruct the jury that the appellee was not entitled to recover. 1st. Because he had consented to take the judgment against the obligor in the assigned single bill, subject to a stay of execution for thirty days. And 2dly, because the *ca. sa.* that was issued upon that judgment had been entered, “not called by consent of parties;” which direction the court refused to give; and to that refusal to give the instruction prayed, there would have been no objection, if the court could have stopped there.

The declaration contains three *counts*. The first a special count, on the assignment of a single bill; and the other two, a general *indebitatus assumpsit*, for oxen sold and delivered, and a *quantum valebant*. It is not a case between a surety and creditor, presenting the question whether the creditor has so given time to the principal debtor as to discharge the surety; but active diligence was imposed upon the appellee in pursuing the obligor for a recovery of the sum due on the bill assigned to him, so as that nothing should be lost by his *laches*. And the question is, whether he did use due diligence; which is a question for the decision of the court.

If the obligor, *Magruder*, had been notoriously insolvent at the time of the assignment, or had become so before the first term of the court after the assignment, so as to have rendered a suit against him futile, there would have been no obligation on the appellee to institute a suit, and incur the useless cost of a profitless action; and having instituted a suit on the bill to the first term after the assignment, and obtained a judgment in due and regular course of law, if *Magruder* was notoriously insolvent at the time of the ren-

dition of the judgment, and has continued so ever since, and no loss has accrued either by reason of the judgment being taken with a stay of execution for thirty days, or of the *ca. sa.* being entered “not called by consent,” neither the entry of the stay of execution, or of the *ca. sa.* not called by consent, nor both, had the effect to discharge the appellant, the assignor of the bill, from any liability that before existed on account of the sale of the oxen.

If *Magruder* was at the time of the rendition of the judgment, and continually afterwards, “wholly insolvent, and had no property that could be levied upon,” the suing out an execution would have been nugatory, and the stay of execution did no injury to any body, and the appellee was under no necessity to pray him in commitment on the return of the *ca. sa.*, and have him put to jail, where under the law of this State he must have been supported at his cost without benefit to any one. Nor need he have sued out a *ca. sa.* at all. A *fieri facias* with the return of *nulla bona*, which must have been made if *Magruder* was insolvent, and had no property to be levied upon, would have been sufficient.

The court then did right in refusing to instruct the jury, that upon the evidence in the cause the appellee was not entitled to recover.

But the court went further, and instructed the jury, “that if they should find from the evidence that at the time of the rendition of the judgment, and the return of the *ca. sa.*, and entering it not called, *Magruder* was insolvent, and incapable of paying his debts, and has continued so ever since, the appellee was entitled to a verdict, for such sum as they should find due from the sale of the oxen.” Thus assuming the fact of the sale of the oxen, and that the assignment of the single bill was on account of the prior debt so incurred, which were facts to be found by the jury.

If the appellee sold the oxen to the appellant, and received the single bill of *Magruder* on that account, without an agreement to receive it as *payment* for the oxen, and to

Jamieson vs. Bruce.—1834.

run the risk of its being paid or not, it was not an extinguishment of the debt due for the oxen, which continued liable to be enforced if the assigned bill, without *laches* on the part of the appellee, should not be paid. *Glenn vs. Smith*, 2 *Gill and Johns*. 432.

But whether that was the character of the transaction, or whether the oxen were exchanged for the bill, or the bill was purchased from the appellant by the appellee, and the oxen given as the consideration, were questions for the jury, and not the court, to decide.

We think therefore, that the instruction of the court to the jury, as set out in the second bill of exception, was wrong, and that the judgment must on that account be reversed, and the cause sent back with a *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN JAMIESON vs. THOMAS BRUCE.—*June*, 1834.

When a mortgage of personal property contains no agreement that the mortgagor should retain possession until forfeiture, and the mortgagee permitted the property to remain for some time in the possession of the mortgagor, but afterwards and before forfeiture took it away, the mortgagor cannot maintain trespass for such asportation.

Courts of equity consider a mortgage as a mere security for money, but this is not the light in which it is viewed in courts of law. Upon execution of the mortgage the legal estate becomes immediately vested in the mortgagor, and the right of possession follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly admitted until the will of the mortgagor is determined.

APPEAL from *Prince Georges* county court.

This was an action of trespass, *vi et armis*, for taking and carrying away certain slaves, instituted by the appellant against the appellee, on the third day of February, 1832.

It appeared by the bill of exceptions taken at the trial, that the property had been mortgaged by the plaintiff to the

Jamieson vs. Bruce.—1834.

defendant on the 19th August, 1831, with a condition, that the instrument should be void in case the mortgage debt was paid on or before the first day of September, 1832. There was no stipulation in the deed, that the mortgagor should continue in possession of the property until forfeiture; but the proof was, that the defendant (the mortgagee) permitted the negroes to remain in the mortgagor's possession, from the date of the mortgage, until some time in November, 1831, when he took possession of them in the night, in the absence of the mortgagee.

Upon this evidence the plaintiff prayed the court to instruct the jury, that if they should find from the evidence, that the plaintiff remained in the possession of the negroes in question, with the consent of the defendant, from the time of the execution of the mortgage until they were taken from his possession by the defendant; and if they should further find from the testimony, that said negroes were taken from the plaintiff by the defendant, without the plaintiff's knowledge or consent, and without a previous demand; that then such taking made the defendant a trespasser, and that they must find a verdict for the plaintiff. This instruction the court (KEY and DORSEY, A. J's) refused to give. The plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

T. F. Bowie, for the appellant, contended,

That the taking and carrying away the negroes, in the manner and under the circumstances established by the proof, made the defendant a trespasser, and responsible for damages in the present action. He referred to 11 *Johns. Rep.* 534. *Doug.* 610. 19 *Johns.* 326. 6 *Cowen*, 150. 4 *Kent's Com.* 148, 153, 188. 2 *H. and McH.* 317. 3 *Ib.* 399.

No counsel argued for the appellee.

ARCHER, J., delivered the opinion of the court.

The point in controversy in this cause involves the consideration of the relative rights of mortgagor and mortgagee, before forfeiture, and in a case where the mortgage contains no covenant, or agreement that the mortgagor shall retain possession of the property mortgaged.

The mortgagor seeks to make the mortgagee, obtaining peaceable possession of the mortgaged property before forfeiture, a trespasser.

This is not a case in which there is any express covenant, that the mortgagor shall continue in possession until there is a default in payment, nor is it a case in which, by fair inference or necessary implication from the instrument, the conclusion can be drawn, that the mortgagor was quietly to enjoy the mortgaged property, but on the contrary, the the instrument is wholly silent on the subject. The parties therefore must stand upon their legal rights, according to the terms used in the conveyance.

Courts of equity consider a mortgage as a mere security for money. But this is not the light in which it is viewed in courts of law, which as Mr. *Justice Bailey* observes, in 1 *Dow. and Ry.* 273, generally know nothing about mortgagor and mortgagee. They look solely to the estate conveyed by the instrument, and consider the mortgagor in possession, unless under the circumstances above mentioned, as the mortgagee's tenant, and strictly within the definition of a tenant at will; not to be sure, entitled to all the privileges of a tenant at will, or answerable for the burthens of such an estate, but liable to have his possession defeated in the same manner. Upon the execution of the mortgage the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly permitted until the will of the mortgagee is determined. It is said in 1 *Pow. Mortg.* 171, that as soon as an estate in mortgage is created, the mortgagee may enter into posses-

sion, but as the payment of interest is the principal object of the mortgagee, he seldom avails himself of that right, unless obliged so to do to secure the payment of the interest, or with a view to compel the repayment of the money. This right of possession is always subject to any agreements which may be made in relation thereto, and mortgages do generally contain clauses, giving the right of possession as against the mortgagee until forfeiture; but where the parties are entirely silent as it regards the possession, the right thereto follows the legal estate, and vests in the mortgagee.

The above doctrine appears also generally to correspond with the decisions in the different states, although there is certainly some conflict of authority.

It is said in 2 *Mass. Rep.* 43, that after the creation of the estate upon condition, the mortgagee has presently the same right to enter *in pais* and take the profits, or by judgment and execution in a writ of entry, that he would have if the estate were absolute, subject to account for the profits if the mortgagor perform the condition, or redeem. In *New Hampshire, Maine* and *Pennsylvania*, the same doctrines appear to prevail; and in 4 *Rand.* 248, it is said, that a mortgagee is entitled to an estate as tenant in fee, or for a term of years, as the case may be, or to an absolute estate in personal property, as regards the title, subject to any agreement as to possession, and defeasible at law by the performance of the condition.

In *New York* a different doctrine prevails, and a mortgagor may there maintain trespass against a mortgagee. Even the action of ejectment by a mortgagee is abolished, and the mortgagee is driven to rely upon a special contract for possession, if he wishes it, or to the remedy by foreclosure and sale.

Upon the whole, although there may be cases in which a court of law, as well as a court of equity, would treat the mortgagor as the substantial owner of the estate, yet we are satisfied, that unless there be some agreement between

Waters vs. Duvall.—1834.

the parties, the mortgagee is entitled to possession when he chooses to exercise the right.

This privilege appears to be essential to the protection of the property mortgaged, and without such right the security would in many cases be entirely fruitless.

JUDGMENT AFFIRMED.

NATHAN J. WATERS vs. CHARLES DUVAL—June, 1834.

The county court upon a sale of lands under an execution, ought not to issue a writ of *habere facias possessionem*, under the act of 1825, *ch.* 103, where after the return of the execution it does not appear from the record, that notice was given to the tenant in possession, to show cause why the writ of *habere* should not issue.

The tenant against whom a writ of *habere facias* has been issued, under the act of 1825, *ch.* 103, and who has been ejected by it, may upon its return move the court to quash it for the purpose of awarding him restitution. He is not bound to apply for relief before its return, and may then make objection to the sufficiency of the *fieri facias* or its return, and show cause why the *habere* should not have issued.

A return to a *fieri facias* by the sheriff, that he had levied upon a part of a tract of land, is void for uncertainty.

A motion to quash a writ issued by a court of law is exclusively cognizable there, subject however to revision in an appellate tribunal; and hence an application to a court of Chancery for an injunction founded upon a defect in the writ, though granted, and afterwards dissolved upon answer, will not prevent the party obtaining it from moving to quash the writ at its return.

APPEAL from *Prince Georges* county court.

On the 12th of October, 1832, the appellee sued out from the *Prince Georges* county court the writ of *habere facias possessionem*, under the act of 1825, *ch.* 103, to obtain the possession of lands purchased by him at a sheriff's sale, under a *venditioni exponas*, which had issued to make the amount of a judgment in favor of one *Samuel Peach*, against *Nathan Waters*, rendered at April term, 1824. The *fieri*

facias, in virtue of which the lands were seized, issued on the 10th of March, 1825, returnable to the then ensuing April term, when the sheriff made the following return, "that he had levied the same upon the following property of the said *Nathan Waters*, to wit, one tract of land called *Pasture Enlarged*, containing 200 acres; one ditto *Osbourne's Lot*, and a part of *Pleasant Grove*, containing 52 acres; and a part of *Duvall's Pasture*, containing 150 acres; part of a tract called *Tewkesbury*, and part of *Tewkesbury and Walker's Delight*, containing 150 acres."

The sheriff returned "possession delivered," and thereupon the appellant, who claimed the possession of the lands, under a deed from *Nathan Waters* to him on the 17th of February, 1824, moved the court to quash the writ of *habere*, and the return thereto. 1. Because the said writ informally and irregularly issued. 2. Because it is uncertain in all its parts, and not warranted by the previous proceedings. 3. Because *Duvall* acquired no rights whatever in virtue of said pretended sale, even against the defendant, to the execution. 4. Because the said writ could not issue so as to affect the petitioner. And 5. Because the proceedings are in other respects informal and irregular.

In opposition to this motion, the appellee exhibited the transcript of a record from the court of Chancery; by which it appeared that the present appellant had filed a bill against the appellee, for an injunction which was granted to restrain the execution of the writ of *habere facias*, which injunction upon the coming in of the answer had been dissolved. The county court overruled the motion from which the appeal was taken.

The cause was argued before BUCHANAN, Ch. J., and ARCHER, and DORSEY, J.

Alexander and Stonestreet, for the appellant, contended.

1. That the appellant having been in possession before the date of the judgment, under which the appellee became

a purchaser, was not liable to be disturbed by the summary proceeding prescribed by the *Act of 1825, ch. 103*, that act giving this remedy only to the purchaser, where the debtor himself, or some person holding under such debtor, is in possession by title subsequent to the judgment.

2. That even as against the debtor himself, this writ ought to be adjudged irregular and void, because it does not appear that the purchaser has proceeded in manner and form as directed by the act. *Rule of Court, 4 Gill and Johns. 523.*

3. That the return of the sheriff, so far as it relates to *parts* of tracts, is wholly defective, and transfers no title to the purchaser.

A. C. Magruder, for the appellee.

The appellant by going into Chancery for relief against this proceeding, precluded himself of the right now attempted to be asserted. *Lansing vs. Eddy, 1 Johns. Ch. R. 49. Munnikyson vs. Dorsett, 2 Harr. and Gill, 374.*

In the Chancery case instituted by the appellant, there was no plea to the jurisdiction, nor does the bill object to the *habere*, upon the ground that the necessary preliminary steps had not been adopted. *Waters and Peach, 3 Gill and Johns. 408.*

Instead of filing a bill for an injunction, the appellant should have moved the court to quash the sheriff's return upon the return of the writ. The money could then have been returned to the purchaser, whereas now, it is beyond the reach of the court.

That the appellant had notice of the proceedings, is shown by his bill in equity. 2. If however, the proceedings are irregular, and the court set them aside, still the appellant cannot have a restitution, as he was no party to the proceedings; none but a party is entitled to such a writ. *3 Coke's Rep. 52. 1 Binney's Rep. 499.*

DORSEY, J., delivered the opinion of the court.

The proceedings in equity which form a part of the record in this case, and were relied on for the purpose, present no obstacle to the motion of the appellant made on the return of the motion of the *habere facias possessionem* to Prince Georges county court. The relief prayed for in the bill of complaint is not identical with that sought under the motion. Nor if it had been, would it have formed any barrier to the free action of the county court on the application before it. A motion to quash a writ issued by a court of law is exclusively cognizable there, subject however to revision in an appellate tribunal. A court of Chancery has no jurisdiction to try such a question. 'Tis true it may grant relief against any proceeding under such a writ, for which the court whence it issued could furnish no appropriate and adequate remedy; but it cannot quash the writ on account of informality, or any insufficiency of the grounds on which it may have issued.

The appellant was no party to the suit from which the writ under consideration emanated.

At the term whereat it was returnable, and not before, was he bound to object to its validity, or the legality of the proceeding under it. He had no earlier day in court, at which he could ask the court's interposition in his behalf. Until the execution of the writ there had been no invasion of his rights to warrant his invoking the aid of the court as a court of law, *non constat*, that he was to be affected by it. The objection of the appellee therefore, that the motion to quash came too late, cannot be sustained.

The only inquiries left for our examination then are; were the reasons assigned for the motion true? are they sufficient? That the writ as is alleged, irregularly issued, is apparent from the record, which shows that after the return of the *fi. fa.* no notice was given to the tenants in possession, to show cause why an *habere facias possessionem* should not issue. That the want of such notice is fatal to

Callis vs. Tolson's Ex'rs.—1834.

the writ was settled by this court, in the case of *Knott vs. Llewellyn*, at June term, 1833. The truth of the charge of uncertainty in the writ is equally apparent. It commands the sheriff to give possession of "part of *Duval's Pasture*, containing one hundred and fifty acres, part of a tract called *Tewkesbury*, and part of *Tewkesbury and Walker's Delight*, containing one hundred and fifty acres, and part of a tract of land called *Friendship*, containing one hundred and eighty acres," without giving any further description, or affording the means of obtaining it, by which the particular parts intended of said tracts of land could be identified or located.

That a return with such a description of the land seized under a *fi. fa.* is void for uncertainty, has been adjudged in this court; and the reasons of that adjudication are conclusive as to the writ in question.

The judgment of the county court is reversed, the writ of *habere facias possessionem* quashed, and a writ of *restitution* awarded the appellant.

HENRY A. CALLIS vs. FRANCIS TOLSON'S EX'RS.—June,
1834.

To disqualify a witness on the ground of interest, the party objecting to his competency must show the disqualifying interest.

The widow of a deceased testator, who had renounced, in a contract with the executors of the deceased, her rights in the real and personal estate of the deceased, and agreed to accept compensation from such executors for such renunciation, is a competent witness in an action of replevin, brought by the executors for a negro, to prove, that such negro was loaned to the defendant many years before by her husband, who had declared he never would give the slave in question to the defendant, or any of his family; the will of the testator not being in evidence, nor it appearing to the court, that the witness had any special interest in such slave, and the contract with the executors being personal to them, and not binding the assets of the estate.

When property replevied, was loaned to the defendant by the plaintiff, and held and used by him under and in virtue of such loan, though for more than three years before the suit was instituted, such possession does not sustain the plea of the act of limitations. The principle in such case is the same as in a contract of hiring.

The right of a plaintiff to recover property is not barred by the possession of the defendant, accompanied by a claim of title to the property, for more than three years before the institution of the suit, if the possession was originally acquired by loan, and the plaintiff had no knowledge of the adversary claim of the defendant, three years before the suit was brought.

APPEAL from *Prince Georges* county court.

This was an action of replevin for four negroes; a woman and three boys, commenced by the appellees as the executors of *Francis Tolson*, against the appellant on the 8th of March, 1831.

The defendant pleaded property in himself, and the act of limitations, to which there were issues.

1. At the trial the plaintiffs proved themselves to be the executors of *Francis Tolson*, and then offered to prove by the widow of the deceased, that the negro woman in the declaration mentioned, was originally the slave of said deceased, and was sent by him about nineteen or twenty years ago to the house of the defendant, who had married a daughter of their testator, for the purpose of attending on the defendant's wife and child, and that the said testator had repeatedly declared, that he had not given, and never would give, the said slave to the defendant or any of his family.

The defendant objected to the competency of this witness on the ground that her testimony was not admissible to shew a title in the plaintiffs as the executors of her husband to the said slave, because as his widow she had a direct interest in establishing such a title, it being in proof by the following agreement, that she had renounced her right under his will. "Memorandum of an agreement made and entered into this 18th day of January, 1825, between *Margaret B. Tolson* widow of *Francis Tolson* deceased, of the one part, and *Henry Tolson*, *William Tolson*, and *Alfred Tolson*,

Callis vs. Tolson's Ex'rs.—1834.

executors of the said *Francis Tolson*, of the other part; whereas, the said *Margaret* conceives the provision made for her in the will of her husband insufficient for her reasonable support, and is determined not to abide thereby, but to renounce the provisions made for her therein, and to elect in lieu thereof, to take her dower or thirds of the real and personal estate of her said husband; and the parties to these presents believing that many things intended by the said *Francis Tolson* to be done at the expense of his estate for the comfortable maintenance of his wife, is either not expressed in his will at all, or not with such precision as to give on the one hand to the said *Margaret* a legal right to demand, or to afford on the other a legal authority to the executors to furnish them; now for remedy thereof, and to settle the rights and interests of the parties to this agreement, as of all others concerned, in an amicable manner, the said *Margaret* being unwilling to disturb the disposition of his estate made by her said husband, further than is necessary to ensure a comfortable maintenance, these presents witness; that the said *Margaret*, for and in consideration of the premises, and also for and upon the further consideration of the stipulations hereinafter entered into by the said executors, doth hereby release, give up, and quit all claim to her dower in, or thirds of, her said husband's real and personal estate, and also to three hundred dollars *per annum*, of the five hundred dollars per year left her by the will of her said husband; and the said executors in consideration thereof, for themselves and also for and on behalf of all others having an interest in the estate of the said *Francis Tolson*, agree that the said *Margaret* shall have, enjoy and possess, all and singular the bequests, devises, legacies, and immunities given to her, in and by the said will of her late husband, in the same full and ample manner as is expressed therein, except the three hundred dollars per annum above relinquished by the said *Margaret*, and in addition thereto, agree in like manner to pay the said *Margaret*, yearly and and every year, two hundred dollars of the five hundred

dollars per annum bequeathed to her as aforesaid, and also to pay in a reasonable time to *Eleanor C. Tolson* and *Margaret Tolson*, the daughters of the said *Margaret*, (the widow) the sum of one thousand dollars each, in addition to the sum willed them by their father; and further agree to supply, for and during the life of the said *Margaret*, the house comfortably with eating, drinking, &c. and the usual necessities for such a family; and the said executors in like manner further agree, that they will pay the necessary physician's bills for the family, &c. of *Mrs. Tolson*, all of which stipulations are to be performed at the expense of the said estate. Signed and sealed by the parties." And the plaintiffs insisted, that the aforesaid agreement rendered her a competent witness for them in this action, and the court (STEPHEN, Ch. J., and KEY, A. J.) being of that opinion, she was examined accordingly. The defendant excepted.

2. The plaintiffs further proved, that about nineteen years ago the negro woman in the pleadings mentioned, was the property of the testator, *Francis Tolson*, and was by him about that time loaned to the defendant, as a nurse to the testator's grand-child, and the testator then declared that he would loan, but would not give her to the defendant. The defendant then proved, that the property in question had been for nineteen years in his possession, and claimed by him as his own.

Upon this proof, the plaintiffs' counsel prayed the court to instruct the jury, that if they believed the property in the pleadings mentioned was loaned to the defendant by the plaintiffs' testator, that the plaintiffs were entitled to recover, although more than three years had elapsed since the possession of the defendant, unless the testator or plaintiffs knew that the defendant claimed the property adversely, for more than three years before the commencement of this suit. The court gave this opinion; the defendant excepted; and the verdict and judgment being against him, he brought the record upon appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and ARCHER, and DORSEY, J.

Stonestreet, for the appellant, contended.

1. That the widow was not a competent witness. The contract between her and the executors was not such as they were authorised to make. Notwithstanding the contract, the widow was at liberty to claim her proportion of the estate, and as she was not bound it could not be binding on the executors. If however the contract was a valid one, still, as the ability of the executors to perform its stipulations depended on the value of the estate, the widow was not a good witness. She was swearing to swell the fund out of which she was to be paid.

2. Upon this exception he insisted, that the court erred in instructing the jury, "that if from the evidence they should believe, *the property in the pleading mentioned*, was loaned to the defendant by the testator of the plaintiffs, that they were entitled to recover." Because there was no proof before the jury, that three of the four negroes in the declaration mentioned, were the property at any time of the testator, or were ever loaned by him to the defendant: where there is no evidence, it is error to submit the fact to the jury. 4 *Gill and Johns*. 376.

Pratt and Duckett, for the appellees.

The record legitimately presents but two questions for the consideration of this court.

1. Was the county court right, in permitting *Margaret B. Tolson* to give testimony to the jury, in opposition to the prayer of the appellants?

2. Was the county court right in their instruction to the jury, "that if from the evidence they should believe that the property in the pleadings mentioned, was loaned to the defendant by the plaintiffs' testator, that the plaintiffs were entitled to recover, although more than three years had elapsed since the possession of the defendant, and his claim

of title hereto began before the institution of this suit; unless the plaintiff or testator knew that the defendant claimed adversary title to the property for more than three years before the commencement of the suit."

A third question which does not appear by the record to have been raised in the court below, and which, consequently, it is contended, since the act of 1825, ch. 117, cannot be noticed by the appellate court, is, that the instruction of the court to the jury, in the second bill of exceptions, based upon the prayer of the appellees, as set forth in that bill of exceptions, is *defective and erroneous*, because the instruction as granted is *general*, applying to all the property claimed in the action, when it should have been *restricted exclusively* to negro woman *Kitty*; there being no proof in the record to show that either of the other negroes, claimed in the action and covered by the verdict, were ever expressly loaned to the appellant, or were in fact, the issue of negro *Kitty*, born of her *while* in the fiduciary possession of the appellant.

The act of 1825, ch. 117, occludes the point from the judicial cognizance of this court. But if the examination of the point be not inhibited by legislative enactments, still the decision of the court should not be reversed, (if in principle correct) merely because the whole evidence is not stated by the appellant in his bill of exceptions; *more especially* as there is no affirmative proof, that the necessary evidence, although not patent in the record, was not in fact delivered to the jury; and since a presumption of its total absence upon the trial, affixes an inordinate degree of folly not only upon the court, who gave the instruction, but the jury who rendered the verdict.

The first of the two points *really* raised by the record, will be adverted to and briefly considered, to wit: was the court below right, in refusing to grant the prayer of the appellant, that *Margaret B. Tolson's* testimony was not admissible to show title in the plaintiffs' and executors of her said husband to the said slave; because, *as his widow*, she

had a direct interest in establishing such a title, it being in in proof that she had renounced her rights under his will?" The prayer, alleging that she had renounced under the will, and consequently become substituted to her rights under the law, *her rights as widow*, desired the court to reject her testimony, because *as widow* she had a direct interest in increasing the fund in the hands of the executors, which would be for distribution among the distributees of the testator, of which she was one. The prayer did not seek her rejection upon the ground of any other interest which she had in the estate of her husband, than *as widow*. That was the *only* interest requiring her rejection; which was suggested by the prayer to the court. If her interest *as widow* was not found to exist, there was no foundation exhibited to the court by the prayer, upon which her rejection as witness could be predicated. The prayer by attacking her competency, upon the allegation of an interest of a particular character, *concedes necessarily*, if that interest either does not exist, or forms no barrier to her testifying in the cause, she has no other legal interest in the controversy which could render her incompetent as a witness. The inquiry then is, had she *as widow* any interest in the personal estate of her husband at the time the prayer in question was submitted. She undoubtedly had, after her renunciation of the will, unless she had before the trial by some act of her own parted with it? This it is contended, she expressly did, by an instrument of writing, signed and sealed by her, of date the 18th Jan. 1825, and which was produced in evidence both by the plaintiffs and defendants below. In which instrument she uses the following strong and unequivocal language, conclusively proving that she had released all her rights *as widow*. "Doth hereby release, give up, and quit all claims to her dower in or thirds of her said husband's real and personal estate." It was said in argument that *Henry, William and Alfred Tolson*, who are the appellees here, and with whom she contracted in the instrument in question, gave her no valuable consid-

eration, and therefore the release is void. The answer is brief, but irresistible. The release is under seal. It therefore necessarily imports a consideration, and is conclusive upon her.

2. But concede for the sake of the argument that it is hypercritical and unsound. Concede that it was the duty of the court to have rejected the witness upon the prayer of the appellant, notwithstanding it proved she had no legal interest *as widow*; provided, it satisfactorily appeared in proof she had an interest in the estate of *Francis Tolson*, which in a legal point of view constituted a barrier to the reception of her testimony in the cause. Had she any such interest? If she had she must have acquired it under her contract of the 18th of Jan. 1825, with *Henry, William and Alfred Tolson*. Although the above named individuals in the body of the instrument describe themselves as the executors of *Francis Tolson*, they sign and seal it as individuals, without annexing to their respective names any *descriptio personæ*. If they have attempted to bind the estate of their testator, their attempt is vain. They possess no such power. A suit against them upon the contract if it result in a judgment, must result in a judgment *de bonis propriis, and not de bonis testatoris*. The authorities are abundant and uncontradictory on the subject. 2 *Wms. on Exec.* 1093. *Hosier vs. Lord Arundle*, 3 *Boss. and Pull.* 7. *Jennings vs. Newman*, 4 *Term. Rep.* 347. *Barry vs. Rush*, 1 *Term. Rep.* 691. *Rose vs. Bowler*, 1 *Hen. Black*, 108. *Brigden vs. Parks*, 4 *Boss. and Pull.* 424. *Curtis' Executors vs. Bank of Somerset*, 7 *Harr. and Johns.* 25.

It is therefore most apparent upon the foregoing authorities, that the executors had no power by contract to bind the estate of their testator for the payment of the stipulations specified in their agreement of the 18th of January, 1825.

3. But further, concede for the sake of the argument, that the executors did possess the power to bind the estate of their testator, and give the widow an interest in that estate, different from her interest *as widow*, which it seems

she had expressly released. What was the character of that interest? And was it such an interest as constituted a legal ground for the rejection of her testimony upon the trial? Her interest was that of a general creditor of the estate, and none other. She had no *interest* in the residue *as residue*; which was to be increased or diminished, in exact proportion to the enhancement or diminution of that residue. It was a certain interest in the estate, which, provided the estate was solvent, was not to be magnified by reason of its wealth. The interest which alone will exclude a witness is not a doubtful, remote and future, but a certain, immediate, legal interest in the cause depending. It must be a vested interest in the result of the cause; not an uncertain or contingent one. To have rendered her interest certain and not doubtful, the insolvency of the estate should have been proved; but it was neither proved nor alleged. The agreement of the executors *as to them* is conclusive as to the solvency of the estate; and by the court in the absence of proof or allegation to the contrary, should have been regarded as *prima facie* evidence of such a condition. The allegation of *interest* in the witness, amounting to legal disqualification to testify, came from the defendants. It was therefore incumbent upon them to prove it. It could only have been proved by proof of the estate's insolvency, of which there was none. The propositions laid down under the last branch of the argument, will be found amply sustained by the following authorities. 2 *Stark. on Ev.* 744, 745, 746. *Swift on Ev.* 58. *Henry vs. Morgan*, 2 *Binney*, 497. *Bower vs. Kendall*, 14 *Serg. and Rawle*, 178. *Baines vs. Katch*, 3 *New Hampshire Rep.* 304. *Hillhouse vs. Smith*, 4 *Day's Rep.* 432. *Green's Case*, 2 *Dallas*, 50. *Paull vs. Sutton*, 6 *Esp. Rep.* 34. 1 *Camp.* 381. *Carter vs. Pearce*, 1 *Term. Rep.* 163. *Owens vs. Collinson*, 3 *Gill and Johns.* 25. *Barry vs. Rush*, 1 *Term. Rep.* 692.

4. But concede for the sake of the argument, that *Margaret B. Tolson* was an incompetent witness, and should

have been rejected, still, if the court below were right in their instruction in the second bill of exceptions, *procedendo* ought to issue; because the appellants in their second bill of exceptions, expressly admit that the plaintiffs below proved upon the trial “by a legal and competent witness,” the very facts which they proposed to prove by *Margaret B. Tolson*—and *non constat* by the record that, that “legal and competent witness” was *Margaret B. Tolson*. In *Morgan vs. Morgan*, 4 *Gill and Johns*. 495, this court have said, that where they “believe the plaintiff can recover nothing, they will not award a *procedendo*; though they reverse the judgment of the county court rendered in favour of the defendant,” they will not therefore in this case award a *procedendo*, because the county court were wrong in permitting *Margaret B. Tolson* to testify for the plaintiffs, the defendants conceding the production upon the trial of the same testimony given *by her*, through the medium of an unexceptionable witness.

Secondly. As to the instruction of the court below, in the second bill of exceptions, the general principle embraced in it, if not expressly granted by the counsel of the appellant, was certainly not expressly denied by him. The general principle of the decision may be stated to be, that the relation of trustee and *cestui que trust* having been satisfactorily established to have once existed between the defendant and plaintiff in regard to the subject matter of the suit—so long as that relation continues, length of time is no bar to the action instituted by the *cestui que trust* to recover the possession of the trust property. That so long as property loaned remains in the possession of the bailee, the statute of limitations is no bar to the recovery of the bailor, unless the bailee has set up an adversary claim to the property for more than three years before suit brought; of which the bailor was cognizant, and which he acquiesced, either expressly or impliedly. We contend that the trustee or bailee cannot by his simple declaration convert his fiduciary into an adversary possession. That until his pos-

Callis vs. Tolson's Ex'rs.—1834.

session does become adversary to that of the bailor or trustee, (which can only be by demand and refusal) the statute of limitations does not begin to run—that until such demand and refusal, the possession of the trustee is in fact the possession of the *cestui que trust*. See the following authorities. *Redwood vs. Riddick*, 4 Mun. 222. *Gist vs. Cattle*, 2 Dess. 53. *Hutchinson vs. Hutchinson*, 4 Dess. 77. *Johnson vs. Humphreys*, 14 Searg. and Rawle, 394. *Ward vs. Reeder*, 2 Harr. and McHen. 145. *Fishwicke vs. Sewell*, 4 Harr. and Johns. 430. *Ballantine on Lim. Appendix A. 357, et sequentibus*.

BUCHANAN, Ch. J., delivered the opinion of the court.

The suit is in replevin by the executors of *Francis Tolson*, for certain negroes named and described in the writ, as the mother and her three children, to which there are three pleas; property in the defendant; *non cepit* within three years, &c.; and *actio non accrevit* within three years, &c.

At the trial the plaintiffs offered to prove by the widow of *Francis Tolson*, that the woman named in the declaration was originally the slave of the deceased, and was, about nineteen or twenty years before, sent by him to the house of the defendant, who had married his daughter, for the purpose of attending on his wife and child, which was permitted by the court: and the objection raised on the first bill of exception is, that *Mrs. Tolson* was an incompetent witness to prove a title in the plaintiffs, the executors of *Francis Tolson*, to the negro woman, on the ground, that being the widow of the deceased, and having renounced all right under his will, she had a direct interest in establishing such a title; and in support of that proposition the contract under seal entered into between her and the plaintiff's, which is set out in the bill of exceptions, is relied upon. But we cannot perceive what aid is brought to the objection to *Mrs. Tolson's* competency by the contract so invoked.

By that contract, in consideration of difficulties attending the construction of the will of *Francis Tolson*, of a mutual wish to settle the rights and interests of all concerned in an amicable manner; of the unwillingness of *Mrs. Tolson* to disturb the dispositions made by her husband of his estate, further than was necessary to secure to her a comfortable maintenance, and of the stipulations on the part of the plaintiffs, she in terms, *releases, gives up, and quits all claim to her dower in, or thirds of, her husband's real and personal estate*, and also to three hundred dollars per annum, of five hundred dollars per annum bequeathed to her in the will: and the plaintiffs on their part among other things, contract to pay her the other two hundred dollars, and that she shall possess and enjoy all the bequests, devises, legacies, and immunities given her by the will, except the three hundred dollars relinquished by her.

What direct interest then had she in establishing the title of the plaintiffs to the negro woman, to whom her testimony relates? The will itself is not in the record, and does not appear, and there is nothing to show that the negro woman was bequeathed to her, or what, if any, disposition was made of her. She may for any thing that appears have been bequeathed to somebody else, and to disqualify a witness on the ground of interest, the party objecting to his competency must show that disqualifying interest, which has not been done here. On the contrary, the instrument relied upon shows that the witness objected to had no such interest as the widow of *Francis Tolson*. By that very contract she had abandoned all right and claim to dower in, or the thirds of, her deceased husband's real and personal estate, reserving only a claim to two out of the five hundred dollars per annum bequeathed to her; and for that and the enjoyment stipulated by the plaintiffs, of the other bequests and devises to her in the will, she had taken their responsibility upon their contract, and could not disturb any disposition by them of the residue of the estate. That contract is the personal contract of the plaintiffs, binding

only upon them in their individual capacity, and she could have no recovery against them for a violation of it, to bind the assets of their testator. Nor does there appear to have been any deficiency of assets. On the contrary, the contract amounts to an admission of assets; and therefore, as far as appears to us, she was not disqualified as a witness in this case, by any claim that she may have to the two hundred dollars under the will of *Francis Tolson*, against his executors as such.

As to the pleas of the statute of limitations, it is perfectly clear, that if, as is contended, the property mentioned in the declaration was in truth loaned to the defendant, by the testator of the plaintiffs, and held and used by him under and in virtue of such loan, though for more than three years before the suit was instituted, such possession could not have the effect to bar the recovery sought by the plaintiffs. As well might it be said that possession for more than three years before the bringing of the suit under a contract of hiring, would operate as a bar under the statute of limitations. The principle is the same. Nor would the right of the plaintiffs to recover be barred by the possession of the defendant, accompanied by a claim of title to the property for more than three years before the institution of the suit, if the possession was originally acquired by loan from the testator, and neither he nor the plaintiffs had a knowledge of the adversary claim of the title of the defendant three years before the suit was brought; and it is presumed, that the court below only intended to have expressed its opinion, in relation to the operation of the act of limitations upon a possession acquired by loan, or permission, and not originally adverse in the hypothetical opinion and direction to the jury, that the plaintiffs were entitled to recover the property mentioned in the pleadings. In which opinion as an abstract proposition we concur, but perceive no evidence in the record to justify the direction given to the jury, to the extent it goes. The only evidence in the record on the part of the plaintiffs is, that the negro

woman was the property of the testator, *Francis Tolson*, and was loaned by him to the defendant about nineteen years ago, as a nurse to his child, with no proof of knowledge by the testator or the plaintiffs, of any claim of title by the defendant. To a possession so acquired and held, the act of limitations does not attach. But the direction of the court goes further, and embraces all the other negroes named in the proceedings, who are not only not proved to be the children of the woman, of whom the evidence is, that she was the property of the testator, and was loaned by him to the defendant; but there is not a word of evidence in the record, that either of them was ever owned by the testator, or loaned by him to the defendant; and in the absence of all such proof, with the evidence set out in the record, that they had been in the possession of the defendant, who claimed them as his own, for about nineteen years, and the testimony in relation to the woman also stated in the bill of exceptions, we must take it, that there was no other proof in the cause; and then, the hypothetical direction to the jury, that the plaintiffs were entitled to recover them if they believed they had been loaned to the defendant by the testator, &c. would appear to have been given not only without any evidence to support or justify it, but in the very face of the evidence on the part of the defendant, which standing alone and uncontradicted as it does in the record, in relation to all the negroes except the woman, furnishes a complete defence to the claim set up by the plaintiffs to the others.

We do not therefore concur in the opinion and direction expressed in the second bill of exceptions, and must for that reason reverse the judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Campbell and Voss vs. Poultney, Ellicott & Co. *et al.*—1834.

CAMPBELL & VOSS vs. POULTNEY, ELLICOTT & Co. *et al.*
June, 1834.

A bill alleged that C and others were stockholders in the *Union Bank of Maryland*, and that by its charter regulating the right to vote for directors, a certain standard of voting was prescribed, fixing *sixty* votes as the *maximum* to which any single proprietor of stock could be entitled, and that no share should confer the right of suffrage which should not have been holden four calendar months previous to the day of election; that P and E large proprietors of stock, with the fraudulent intent of evading the provisions of the charter in that respect, and for the purpose of increasing their number of votes, caused a number of shares to be transferred to *divers unknown persons* without consideration, and colorably, taking from the transferees powers of attorney, securing to them P and E all control over said stock, and the right to vote the same at their discretion; that this was a fraud upon the charter and complainants as stockholders, of which P and E designed to avail themselves at the coming election. The bill prayed an injunction against P and E, the President, Directors, and officers of the bank, and the judges of its election, and for *subpena* against P and E, T E president of the bank, R M cashier thereof, five of the directors by name, three of the clerks of the bank, and the judges of the election when appointed. Upon this bill it was held.

1. That the matter of the bill furnished sufficient ground for the interposition of a court of equity.
2. That the facts stated are a violation of the principles and spirit of the charter, and if carried into effect would be a practical fraud upon the complainants, and in derogation of their chartered rights, for which an injunction was the appropriate remedy.
3. That the relief granted by the injunction was a proper remedy.
4. That the objection for the want of proper parties, and to the injunction, having issued against persons unknown, is not sustainable.

APPEAL from the court of Chancery.

On the 3d of July, 1834, the appellants filed their bill on the equity side of *Baltimore* county court, for the purpose of restraining by injunction the voting of certain shares of stock in the *Union Bank of Maryland*, at an election of directors of said bank then about to take place.

The bill alleged that the appellants *James Mason, Campbell* and *Robert S. Voss*, are stockholders in the said bank, which was chartered in the year 1804. That by the 10th

Campbell and Voss vs. Poultney, Ellicott & Co. et. al.—1834.

section of the act of incorporation, certain rules and limitations are prescribed, regulating the right to vote for directors in the proportions following, that is to say; for one share and not more than two, the holder shall be entitled to two votes; for every two shares above two and not exceeding ten, one vote; and so on, the ratio increasing progressively according to the number of shares, and fixing sixty as the greatest number of votes to which a single proprietor of stock shall be entitled; and declaring that no share or shares shall confer the right of suffrage, which shall not have been holden four calendar months previous to the day of election. That the legislature in fixing the standard of voting, designed preventing the power of electing directors being concentrated in a few hands, and that the rights of the small stockholders should be protected. That the appellees *Samuel Poultney* and *William M. Ellicott* trading under the firm of *Poultney, Ellicott & Co.* having during the years 1833-34, become the proprietors of between two and three thousand shares of stock in the said bank, with the fraudulent intent of evading the provisions of the charter in that respect, and for the purpose of increasing the number of votes which otherwise they would be entitled to on their aforesaid stock, at the ensuing election of directors to take place on the first Monday of the present month of July, caused about two thousand shares thereof, then as the complainants charge and believe, pledged to the said bank for advances made to the said *Poultney, Ellicott & Co.* to be transferred to divers unknown persons, without consideration and colorably; taking at the same time from the transferees powers of attorney, securing to them, the said *Poultney, Ellicott & Co.* all control and authority over said stock, and the right to vote the same at their discretion. That these transfers were made some time in the latter part of February, or the beginning of the last March. That this arrangement, by which these proprietors seek to exercise a greater influence in the ensuing election of directors, than by the charter

Campbell and Voss vs. Poultney, Ellicott & Co. et. al.—1834.

they would otherwise be entitled to, is not only a fraud on that instrument, but upon the complainants and all the other stockholders, and may result in the election of a board of directors, not the choice of the legal voters. The bill then prays, that an injunction may issue prohibiting the said *Samuel Poultney* and *William M. Ellicott*, the president, directors, and officers of the bank, their agents and servants, from voting the said stock at the ensuing election; and the judges of the election from receiving any vote, which may be tendered by virtue of any power of attorney, which may be executed by any persons to whom the said stock may have been transferred by the said *Poultney* and *Ellicott*, and for general relief; and that *subpœnas* may issue against the said *Samuel Poultney* and *William M. Ellicott*, *Thomas Ellicott* president of the *Union Bank of Maryland*, *Robert Mickle* cashier thereof, five of the directors by name, three of the clerks, and the judges of election when appointed.

An injunction according to the prayer of the bill was granted by the county court, with leave to the defendants to move for its dissolution, on the succeeding Saturday the 5th inst.

The proceedings having been removed to the high court of Chancery upon the suggestion of the defendants, and a general demurrer filed to the bill; the motion to dissolve was heard by his honor, *Bland*, Chancellor, on the 5th, agreeably to the above leave, and the injunction was by him dissolved on that day.

From the order dissolving the injunction an appeal was allowed, under the act of 1832, *ch.* 97, and the record accordingly brought before the court of Appeals at this term.

The cause was argued before *BUCHANAN*, Ch. J., and *MARTIN*, *STEPHEN*, *ARCHER*, and *DORSEY*, J.

A. C. Magruder, for the appellants, contended.

1. That the allegations in the bill amounted to a violation of the charter of the bank, and show that the shares in

Campbell and Voss vs. Poultney, Ellicott & Co. et al.—1834.

question cannot be voted, at the election referred to. A bank, though a corporation, is in the nature of a partnership, and the corporators *inter se*, have all the rights of partners. Every stipulation in the contract of partnership, not contrary to some principle or the policy of the law, should be fairly executed. This controversy is among the individual stockholders, and involves no complaint against the bank as a corporation. It does not seek a forfeiture of the charter—if it did, a court of law would be the proper tribunal. There is no case in which a court of Chancery may not interfere by injunction to prevent frauds, or breaches of contract and good faith. 1 *Mad. Ch. Pr.* 125. *Chitty's Gen. Pr.* 704. In such a case as the present, the remedy is not by *mandamus*. *Chitty's Gen. Pr.* 789. But if it was, it does not follow that Chancery could not interpose by injunction. *Jeremy's Eq.* 306. There can be no doubt that the transfer of the shares in question, for the purpose charged, could have been restrained by injunction, and if the transfer could have been prevented, why may not the object of the transfer be frustrated in the same way. 6 *Johns. Ch. Rep.* 160. 1 *Ib.* 18. And the same cases show that if the election had taken place, and had been controlled by these votes, the court could still have interfered by injunction, though the operations of the bank would have been arrested by it.

The judges of the election can only look to the books in determining the right to vote. They have no power to inquire into the facts connected with the transfers; but if they had the power, they have not the means of arriving at the truth. In this case an injunction is the appropriate remedy. 9 *Johns. Rep.* 507. 1 *Johns. Ch. Rep.* 611. 4 *Ib.* 150. 6 *Ib.* 439. 2 *Dallas.* 405.

Constable, Otho Scott, Nelson, and Winchester, for the appellees.

1. The bill is defective in not making proper parties,

either complainants or defendants, and in that respect presents a case unfit for an injunction.

There is no allegation of a breach of trust, or violation of the charter by the corporation. The controversy is limited to the corporators themselves; involving merely a question of *privilege*, and affecting no right of property. The bank as a corporation is not a party, nor are the transferees of the stock, whose privileges it is the object of the bill to affect. The president, and cashier, and certain of the directors, *eo nomine* are made parties; but not the bank by its *corporate name*, by which alone, can it sue and be sued. 2 *Paige*, 449.

No decree settling the rights of the parties can be passed, without making the bank a party, whose very existence is suspended by the proceeding. It should therefore be before the court to defend itself. The fraud complained of cannot be consummated except through its agency.

If the charter constitutes a contract, it is a contract between the corporation and the State, and each corporator with the corporation; and yet this bill, complaining of a violation of the contract, does not bring the corporation, one of the contracting parties, before the court. The transferees also should have been before the court, in vindication of their rights, and to repel the charge of fraud. If the names of the transferees were not known, the information should have been asked of the bank, and not of *Poultney, Ellicott & Co.* An injunction will never issue against any but parties to the bill, having substantial interests, as have these transferees and the bank. 4 *Johns. Ch. Rep.* 25. Nor have the proper parties complainants been made.

The bill charges a violation of the charter of the bank, and yet the bank is not a complainant. The charter is not the charter of these complainants, but of the bank. In legal contemplation the complainants have no interest in the charter. If the rights of any of the corporators are affected by the acts complained of, the rights of all are; and all therefore, as represented by the corporation, should make

the complaint. If the present bill is sustained, then each stockholder might file his bill for the same thing.

2. Chancery has no jurisdiction of the case presented by the bill. The funds of the institution are not involved, but merely a privilege in reference to an election. No case can be found, in which a court of Chancery has interfered with a corporate election. When the power of the corporation in that respect has been abused, the injury may be redressed; but never interfered with in anticipation. Such an interference would be an evasion of a chartered privilege. 2 *Kent's Com.* 244. 286. An abuse of the privilege may be corrected by a *mandamus*, or *quo warranto* from a court of law, but Chancery has no such power. 2 *Kent's Com.* 252. 17 *Ves.* 498. 6 *East.* 356. *Angel and Aimes*, 432. 1 *Hopkins*, 359.

The case in the Supreme court of the *United States*, was between the corporation, *as such*, and a stranger to it, in which the former was vindicating its corporate franchises. In 6 *Johns.* 161, the Chancellor avoided the question purposely; and in the case cited from 439 of the same book, the controversy was in regard to property, and not corporate franchises. In 1 *Johns.* 18, the injunction was not to prevent an election, because it issued before the bank came into existence.

3. But suppose the court possessed the power, this bill does not make a proper case for its exercise. The judges of the election have power to decide all questions touching the election; and this court will not, upon the presumption of an abuse of that power, supersede the authority of that tribunal, and in effect abolish it altogether. Whether the stock in question shall be voted or not, is a question peculiarly fitted for the judges to decide, and with their discretion in that respect, it would be most unbecoming in the court of Chancery to interfere.

This bill merely asks for the interposition of the *preventive* power of the court, which is never put forth except where the injury anticipated is likely to prove irreparable.

But here it is impossible to say how the votes will be given, and of course it cannot be asserted that the complainants will be injured. They complain of a mere potential mischief.

4. The facts charged in the bill do not constitute a fraud, nor the acts complained of amount to a violation of the charter of the bank. 6 *Harr. and Johns*. 126. *Chit. Dig.* 1184. A beneficial interest in the stock is not necessary to entitle the party to vote. 6 *Wend.* 510. 4 *Cowen.* 358. A transfer on the banks books will prevail against a transfer of the certificate of the stock. 3. *Wheat.* 390. Nothing more is required than that the stock should be transferred as provided by the charter. If a beneficial interest had been required, the legislature would have said so, and given the judges of election authority to inquire into the fact.

Johnson, in reply.

Before the charter of the *Union Bank* was granted, an association of individuals had been banking under certain articles. The charter gave these individuals the privilege of banking under a corporate name, and exempted them from personal responsibility. Neither the members of the association or the legislature, could have supposed or intended, that the section limiting and regulating the right to vote, should be *nugatory* either in theory or practice. If this section of the charter may be *evaded*, why may not every other? The bank it is true, can only look to its books in ascertaining who is the proprietor of its stock, but as between individuals, the question always is, *who is the real owner*. The case in 6 *Harr. and Johns*. 439, decides, that a party who has conveyed property colorably to another, to make him eligible to office, cannot recover it back; but it does not decide, that the grantee was rendered eligible by such conveyance. The case in 4 *Cowan.* 358, is totally different from this. There the transferees were *bona fide*, and the object was to have the stock represented; whilst here, the purpose is the *fraudulent one* of multiplying the

Campbell and Voss vs. Poultney, Ellicott & Co. et al.—1834.

number of votes to which the stock is fairly entitled, by *fictitious* transfers.

According to the charter, *Poultney, Ellicott & Co.* are entitled to but *sixty* votes, which the bill alleges they intended to increase to *two thousand*, by the contrivance complained of. This, by destroying the fair relative influence of the complainants in the election, is an obvious fraud upon their rights.

It has been argued that the proper remedy is by *quo warranto*, but as the judgment upon that writ would destroy the charter, which the complainants are interested in maintaining, it would not answer their purpose. The writ of *mandamus* is equally inefficient. That is a proceeding to oust those who are not entitled to possession, and to put in those who are. It can only be resorted to after the *fraudulent* party has acquired the possession, and has it in his power to use the funds of the bank to defend his own usurpations. It is a dilatory tedious proceeding, which could not be brought to a close in less than twelve months; during which *irreparable* injury might be done the complainants and others, not only in the employment of their own money in defending the possession of the illegally appointed directors, but in lending the funds of the bank to persons in whom a properly chosen board would have no confidence.

The subjects of complaint presented by this bill, could not be investigated by the judges of election. They have no process to bring witnesses before them, nor could they swear them if they had. Besides, if the judges are competent to decide such questions, their judgment must be conclusive, and then neither *quo warranto* nor *mandamus* would lie.

The objection as to parties can have no effect upon the present motion. The bill charges fraud, and the demurrer admits it, and gives no notice that the want of parties is relied on. A demurrer for want of parties must show who are the proper parties. *Mitf.* 238. If all necessary parties are not made, the injunction is not on that account to

be dissolved, but the bill should be amended. *Act 1832, ch. 302, sec. 6.* It has been said that an injunction will never issue but against parties, but if this be so, it does not follow that it is to be dissolved, as to those who are made parties. But the necessary parties are made. *4 Johns. Ch. Rep. 25.*

The transferees the bill alleges were not known, but if they were, the absence of all interest in them is admitted by the demurrer. Neither can the bank as a corporation have an interest, the question affecting merely the rights of individual stockholders. If however the bank should be considered a necessary party, she is one, process being prayed against the president and directors.

The court of Appeals reversed the order of the Chancellor with costs to the appellants in both courts; awarded an injunction to have the same effect as the one originally granted by the county court; and remanded the proceedings to the court of Chancery, that the necessary orders might be passed by that court to give the appellants the benefit of this decree.

In pronouncing this opinion BUCHANAN, Ch. J., stated the grounds to be,

1. That the matter of the bill furnishes sufficient ground for the interposition of a court of equity.

2. That the facts stated are a violation of the principles and spirit of the charter, and if carried into effect would be a practical fraud upon the appellants, and in derogation of their chartered rights, for the protection of which an injunction was the appropriate remedy.

3. That the relief granted by the injunction was a proper remedy.

4. That the objection raised in argument for the want of proper parties, and to the injunction having issued against persons unknown, is not sustainable.

ARCHER, J., dissented, and stated that he was of opinion that the decree of the court of Chancery should be affirmed.

Jordan vs. Trumbo.—1834.

The determination of the right of voting for the officers of incorporated institutions such as this, is purely a question of legal cognizance, with which a court of Chancery has nothing to do. He said, that if he believed the court could entertain jurisdiction in the case, he would perhaps have had little difficulty in saying, that the facts set forth in the bill, presented a case which, if carried into execution, would have been a violation of the charter.

Entertaining the opinion above expressed upon the subject of jurisdiction, he expressed no opinion upon the subject of parties, not deeming the consideration of that question necessary.

SAMUEL JORDAN vs. GEORGE TRUMBO.—June, 1834.

Upon a bill filed by a security to obtain an injunction and relief from a judgment against him on a bond, alleging the bond to have been founded as an usurious consideration, the principal obligor is not a competent witness for the complainant.

It is a principle well established in equity, that he who goes into equity to be relieved against his usurious contract, must in his bill tender or offer to pay the principal and interest legally due, and confine his claim to the equitable interposition of the court to the usurious excess only.

A mere forbearance to sue a principal debtor does not discharge a security.

APPEAL from the court of Chancery.

This bill was filed by the appellant on the 7th of October, 1830.

At July term, 1832, *Bland*, Chancellor, passed his final decree, dismissing the bill with costs, from which the complainant appealed to the court of Appeals.

The case which was argued before *BUCHANAN*, Ch. J., *STEPHEN*, *ARCHER*, and *DORSEY*, J's, is sufficiently stated in the opinion of this court.

John Scott, for the appellant, contended.

1. That the injunction should have been perpetuated for the whole amount of the judgment, and the judgment having been satisfied, the Chancellor should have passed a decree requiring the defendant to refund to him the amount so paid.

2. If however, the complainant is not entitled to be refunded the whole amount, he is at least entitled to an account of all moneys paid by *Ogg* to *Neff* in his life-time, over and above legal interest and his costs.

T. P. Scott, for the appellee.

1. The answer of *Trumbo*, though an executor, is evidence, as he alleges, that he had a personal knowledge of the transaction, and the bill interrogates him as to his knowledge.

Ogg is not a competent witness. The effect of his evidence is to discharge *Jordan*, who if made to pay the money would have a remedy against the witness, who consequently has a direct interest in defeating the claim. 3 *Gill and Johns*. 35.

2. If however, the charge of usury is established by the evidence, still the decree must be affirmed, as the complainant can only be relieved upon bringing into court the amount of the principal and legal interest, which he has not done. 6 *Harr. and Johns*. 100. 3 *Ib.* 184. 1 *Johns. Ch. R.* 367, 439.

STEPHEN, J., delivered the opinion of the court.

The merits of this case lie within a very narrow compass. A judgment has been obtained at law against the appellant in this court, and complainant in the court below, upon a bill obligatory, in which he joined a certain *George Ogg* as his surety, for the payment to a certain *Henry Neff*, of the sum of two hundred dollars, at twelve months from the date thereof.

The suit at law was originally instituted by *Neff*, and on his death was prosecuted to judgment by *George Trumbo*, the appellee, as his executor.

The complainant in his bill charges the consideration of the bill obligatory to be an usurious loan of money; but that being unable to establish the fact at law, for the want of legal and competent testimony, judgment was obtained against him. The bill prays for a discovery of the usury, and that the defendant may be compelled to account for all moneys paid by *Ogg*, the principal in the bill, to *Neff* the creditor, whether legally or usuriously; that the judgment may be enjoined; that he may be released from the execution issued against him, and for general relief. It is proper to remark, that in addition to the charge of usury the complainant alleges, that he is discharged from his said obligation, by reason of the forbearance of *Neff* to prosecute his claim against *Ogg*, the principal, without his privity or consent.

The answer of the respondent denies the usury, and it is not satisfactorily established by any legal or competent evidence, taken under the commission issued in the cause. The testimony of *George Ogg*, the principal debtor, in the writing obligatory, being clearly incompetent to establish the fact, as the effect of his evidence would in such an event operate to release him from the payment to his surety, not only of the usurious excess of interest paid by him, but also all the costs of the suit. Not only therefore, was the bill properly dismissed, upon the ground of a defect of proof as to the usury, but the complainant was clearly not entitled to relief upon another ground; because it is a principle well established in pleading in equity, that he who goes into a court of equity to be relieved against his usurious contract, must in his bill tender, or offer to pay the principal and interest legally due, and confine his claim to the equitable interposition of the court to the usurious excess only. In 1 *Johns. Ch. R.* 368, Chancellor *Kent* says, "it is a settled principle, that he who asks equity must do

equity, and if the borrower comes into this court for relief against his usurious contract, he must do what is right as between the parties, by bringing into court the money actually advanced, with the legal interest, and then the court will lend him its aid as against the usurious excess. To compel a discovery without such offer, would be against the fundamental doctrines of this court, which will not force a discovery, that is to lead to a forfeiture."

The same principle is stated in 3 *Harr. and Johns*. 185. When the bill in this case was filed, the money was not paid, and the bill did not comply with the above well settled principle of equity, by making the requisite tender of principal and legal interest. So in 5 *Johns. Ch. R.* 143, Chancellor *Kent* again remarks, "the equity cases speak one uniform language, and I do not know of a case in which relief has ever been afforded to a plaintiff seeking relief against usury upon any other terms. It is the fundamental doctrine of the court." *Ld. Hardwick*, in 1 *Ves.* 320, said, that in case of usury, equity suffers the party to the illicit contract to have relief, but whoever brings a bill in case of usury, must submit to pay principal and interest due. *Ld. Eldon*, (3 *Ves. and B.* 14,) after an interval of more than sixty years, declared precisely the same rule. At law, says he, "you must make out the charge of usury, and at equity you cannot come for relief without offering to pay what is really due, and you must either prove the usury by legal evidence, or have the confession of the party."

Neither did the complainant in this case, upon the payment of the judgment, ask leave to amend his bill, (as he might have done,) and pray to be relieved only as to the amount paid, beyond what was legally due and recoverable.

As to the indulgence or forbearance to sue, charged in the bill as a ground of relief, the principle of law is too clear to admit of doubt or controversy.

The law is indisputable that such forbearance alone to sue the principal will not discharge the surety. In sup-

Hall vs. Maccubin.—1834.

port of this position, if an authority be deemed necessary for so plain a principle, reference may be had to 6 *Harr. and Johns*. 247, where the law is stated to be, “that the holder of a bill may forbear to sue the acceptor as long as he pleases, and will not thereby discharge the other parties from their liability, provided he does not agree to give time to the acceptor without their concurrence.”

For these reasons we think that the decree of the Chancellor ought to be affirmed.

DECREE AFFIRMED WITH COSTS.

JOHN HALL vs. JOHN H. MACCUBIN.—*June, 1834.*

M filed his bill against the administrator, widow, and heir at law, of J, for the sale of real estate, sold by M to J, upon which a balance of the purchase money was due. The bill charged that the number of acres in the tract was not ascertained at the time of the sale, but it was agreed to estimate the quantity at 300 acres; that a survey should be made; and any excess should be paid for at the price per acre agreed for the 300 acres. The vendor executed a bond of conveyance, and the vendee gave his bond for the purchase money. After a receipt of a part of the purchase money the vendor assigned his bond to B for value. A survey was then made, and the excess above the 300 acres ascertained. HELD, that as B, the assignee of M, might have a lien for the unpaid balance of his bond, he was a necessary party to the bill.

2d. That as to the excess above 300 acres, the complainant had a lien for the purchase money, and could recover it by a sale of the land, unless the administrator has assets to pay him.

3d. That parole evidence is admissible to establish an independent contract in relation to the excess above 300 acres, if the bonds are silent upon that subject.

4th. That the bill should be so amended as to charge assets in the hands of the administrator, the prayer being, either for a decree against him, or in case of his failure to pay, that the land might be sold.

APPEAL from the court of Chancery.

The present bill was filed by the appellee, on the 26th June, 1829, against the appellant, as the administrator of one

John Matthews, and others his widow and heirs at law, for the purpose of selling certain real estate, which had been sold by the appellee, to the said *Matthews* in his life-time, to pay the balance of the purchase money alleged to be due.

The bill charges, that at the time of the purchase, the number of acres contained in the tract sold, was not ascertained; but it was agreed to estimate the quantity at three hundred acres, with the understanding that a survey should subsequently be made, and if the tract should thus turn out to contain more land, the excess should be paid for at the same rate per acre, as the three hundred acres, the supposed number. That with this understanding a bond of conveyance was executed by the vendor on the 17th of May, 1826, and a bond for the payment of the purchase money by the vendee on the day following. That after the receipt of a portion of the purchase money, the appellee assigned the same to one *Nicholas Brice* for a valuable consideration. That a survey of the land was afterwards made by which it was ascertained to contain a surplus over the estimated quantity of 230 acres; and therefore the complainant called upon the purchaser to secure the payment of the same, in the same manner as had been done with reference to the 300 acres, but this he has refused to do, and the whole amount thereof is now due.

The bill then alleges that the appellant, as the administrator of the purchaser, has taken possession of his effects, and prays that a decree may pass for the payment of the balance of the purchase money; and in case of failure, that the land may be sold for that purpose, upon which it is charged to be a lien, and for general relief.

The answer of the appellant, the administrator of *John Matthews*, put the complainant to the proof of his case, and neither admitted or denied assets.

The answer of the other defendants do not in any way affect the points decided in this case, nor is it deemed necessary by the reporters to introduce any part of the proof taken under the commission.

Bland, Chancellor, at March term, 1833, dismissed the bill with costs, as to the widow, and heirs at law of the purchaser, being of opinion that the vendor had no equitable lien on the land; but decreed that the purchase money, ascertained by the auditor then to be due to the vendor, should be paid by the appellant, as the administrator of the vendee. From this decree the administrator appealed to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER and DORSEY, J.

Magruder, for the appellant, contended.

1st. The proof in the cause did not authorise the Chancellor to pass any decree in favor of the complainant, because, according to the evidence, nothing can be claimed beyond the amount of the bond for the purchase money, parol evidence being inadmissible to contradict the written testimony of the bond of conveyance, and bond for the purchase money.

2d. If, however, the claim was clearly established, the Chancellor erred in decreeing that it should be paid by the administrator; assets sufficient not being admitted or proved, nor even alleged in the bill, which does not seek to recover the money of the administrator.

ARCHER, J., delivered the opinion of the court.

This cause must be remanded to the court of Chancery for the want of parties. *Nicholas Brice*, the assignee of the bond given by *Matthews* for the purchase money, may have a lien for the unpaid balance of his bond; and in the event of the personal property proving insufficient to pay the complainant's claim, the land would have to be sold for the purpose of paying the purchase money. In this point of view the interest of *Brice* might be affected by the decree.

We conceive that the evidence adduced by the complainant, is abundant to show that all the land over three hun-

Hall vs. Maccubin — 1834.

dred acres, was to be paid for at the same rate at which the three hundred acres was purchased. For such excess, the complainants would have clearly a lien for the purchase money, and could recover it by a sale of the land, unless the administrator has assets, wherewith to discharge and pay the purchase money.

The existence of this lien however cannot be definitively determined, until the bond held by *Brice* shall be exhibited in Chancery. Unless there be something in the structure of the bond which negatives the lien, it would have to be enforced upon an insufficiency of assets.

On the supposition that the bond is a mere obligation for the payment of money, without reciting the contract of sale, there could be no possible legal objection to the admissibility of the evidence, in relation to the excess of the land above three hundred acres. It is in this light we have supposed it to exist. In that view, the introduction of the parol evidence would not affect in any manner the contract, as evidenced by the bond of conveyance, and bond for the purchase money, but being evidence of a substantive and independent contract, its admissibility could not be met by any legal objection.

The bill should be amended so as to charge assets in the hands of the administrator, and *Nicholas Brice* should be made a party; and the bond assigned to *Brice* should be brought into the court of Chancery, or its contents proven, if lost, to do effectual justice to the parties.

REMANDED TO THE COURT OF CHANCERY.

ANN HARRIS vs. MARY JOSEPHINE HARRIS, *et. al.*

June, 1834.

H by his will dated in October, 1831, devised 4-9ths of his real estate to W, her heirs and assigns: 4-9ths to be equally divided among the children of W, their heirs and assigns, and in case either of the said children should die under age and without issue, his share to survive to the survivor; and the remaining 9th to the children of J, their heirs and assigns, to be equally divided amongst them, with a similar provision as to survivorship, as in the case of the children of W. A bill was filed by M, against the children of W and J, several of whom were *minors*, praying that the devised lands may be sold, on the ground that they are not susceptible of advantageous division among the devisees, and that they would be benefitted by a sale and division of the proceeds. The Chancellor dismissed this bill, and upon appeal it was held, that in the absence of proof that a sale and division of the land would benefit the minors, the Chancellor acted correctly; but this court believing, inasmuch as the answers consented to the sale, that the substantial merits of the case would not be determined by affirming the decree, remanded the cause to the Chancellor, for further proceedings under the act of 1832.

The Chancellor is not authorised to decree a sale of an infant's interest in land, on the ground that it would be for his benefit, unless upon proof of that fact, of which neither the infant's answer, nor the answer of adult defendants confessing the fact, is evidence to charge the infant.

Under the 12th sec. of the act of 1785, ch. 72, the circumstance, that certain infant defendants are entitled to executory devises in land sought to be sold as not susceptible of division, presents no obstacle to a decree for a sale. The Chancellor has full power to carry into effect the intention of the testator, by making such disposition or investment of that portion of the proceeds of sale affected by the executory devises, as will preserve its subjection to the contingencies imposed on it by the will.

APPEAL from the court of Chancery.

On the 11th of June, 1832, the appellant exhibited her bill in the court of Chancery, praying that certain lands in *Frederick* county might be sold, for the purpose of distributing the proceeds among the parties entitled. The lands in question had been the property of one *John Harris*, who, by his will executed in October, 1831, devised four-ninths thereof to the complainant, her heirs and assigns; four-ninths to be equally divided amongst the children of *Wil-*

Harris vs. Harris.—1834.

liam Harris, (the testator's son,) their heirs and assigns, and in case either of the said children should die under age and without issue, his share to survive to the survivors; and the remaining ninth to the children of *Judah Biggott*, (a daughter of the testator,) their heirs and assigns, to be equally divided amongst them; with a similar provision as to survivorship, as in the case of the children of *William Harris*. The testator died in February, 1832, and this bill was filed by the complainant against the appellees, who are the children of *William Harris* and *Judah Biggott*, several of whom are minors, praying that the lands so as aforesaid devised may be sold, upon the ground, as alleged in the bill, that they are not susceptible of advantageous division among the devisees, and that they will all be benefited by a sale and division of the proceeds, according to their several proportions.

The answers of the parties of age, and of the infants by their guardians, admitted the allegations of the bill and consented that a decree should pass as prayed. The cause was set down for hearing on the bill and answers; and at September term, 1832, *Bland*, Chancellor, passed his decree, dismissing the bill with costs. From this decree the complainant appealed to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

T. Parkin Scott, for the appellant.

The first question is, are all the persons who by any possibility can take as purchasers before the court? They are.

In a devise to a certain class or description of persons, those only can take who are in *esse* at the time of the vesting of the estate. *Viner vs. Francis*, 2 Cox, 190. *Freemantle vs. Freemantle*, 1 Cox, 248. *Ayton vs. Ayton*, 1 Cox, 327. 1 *Ball and Beaty*, 449, 459.

In the case under consideration, the fee simple vested in the children of *William Harris* and of *Judah Biggott*, im-

mediately on the death of the testator; that is, in those children then living, and they are all before the court. If then, there was no devise over, I am undoubtedly entitled to the relief asked for: but there is an executory devise over. To whom? To the defendants in this cause and to no one else: then all the persons who by possibility can be interested as purchasers are before the court.

Second Point. Where several are interested as joint tenants, tenants in common, or parceners in lands which are susceptible of division, such division can be made by decree of the court of Chancery, although some of the parties are infants, with consent or without consent, whether the lands are held for life, in fee tail, or in fee simple; and each one then holds to himself in severalty, the part allotted to him, by the same tenure and for the same estate in duration, as they all held before the partition. 1 *Thos. Co. Litt.* 698 Note N. *Ib.* 701, Note 55, VII. 1 *Ves. and Beame*, 555. 1785, *ch.* 72, *sec.* 12. 1831, *ch.* 311, *sec.* 7. In this cause if the land was susceptible of division amongst the parties who now have the fee, partition could be compelled; and the circumstance of there being a devise over, would not interfere with such division, for it would not enlarge the estate of those who hold the land that is devised over; it would not enable, or in any manner assist the present tenants to defeat the devise over, each would hold his part or allotment as he held his interest in the whole. Again, those who are to take under the executory devise over, are in court, consenting to the prayer of the bill: but they are infants, and this brings me to the third point.

Third Point. (See *act of* 1816, *ch.* 154, *sec.* 13.) Can the court of Chancery decree a sale of lands, in which infants have a contingent interest or estate, under an executory devise? Before the court order any sale of real estate in which infants are interested, the court should be satisfied either, that justice to others demands it, or that the interests of the infants would thereby be promoted.

Harris vs. Harris.—1834.

The plaintiffs counsel supposes, that if the cause was clear of the difficulty in relation to the devise over, the Chancellor would grant the prayer, and decree a sale, as all necessary facts are averred in the bill and admitted in the answer.

Suppose the lands sold, and the money arising from the sale in court for distribution; the proportion of the fund which by any possibility can ever be claimed by those intended to be benefited under the devise over, is now the proportion of the infants, (the contingency is, that the party die under age without issue,) and is under the contrroll of the court, (1785, *ch. 72, sec. 12*, and 1819, *ch. 144, sec. 1*,) and must continue under the contrroll of the court, 1816, *ch. 154, sec. 8*, during the whole time within which the contingency must happen, that can benefit those who are to claim under the executory devise; and if the contingency does happen, the money goes as the land would have gone, 1816, *ch. 154, sec. 9*. And who are the persons to claim under the executory devise? they are the defendants now in court, whose interest will be promoted by a sale of the land, and who cannot under any state of facts, suffer by such sale as I have already shown, the fund being necessarily under the contrroll of the court.

No counsel argued for the appellees.

DORSEY, J., delivered the opinion of the court.

We see no ground for reversing the decree of the Chancellor in this case. If required to pass a final decree therein, he could not have done otherwise than dismiss the complainant's bill. The only evidence that a sale of the lands in question, would have been "for the benefit and advantage, both of the infants and other persons or persons concerned," (without which being made to appear to him, he possessed no power to decree a sale,) was the admission in the answer of the infant defendants. Such admission is not binding upon these infants, and before the Chancellor

could pass the decree prayed for, he must be satisfied of the truth of the material allegations in the bill, by other means than the answer of the infants. We concur with the solicitor of the appellant in the opinion, that the executory devises to the infant defendants, form no obstacle to the decree sought at the hands of the Chancellor. The 12th sec. of the act of Assembly of 1785, *ch.* 72, authorises such a decree, whenever an infant has “a joint *interest*, or *interest* in common with any other person or persons, in equal or unequal proportions, in any lands, tenements, or hereditaments. All parties in interest are before the court, the infant defendants being the persons entitled under the executory devises; and the Chancery court has full power to carry into effect the intention of the testator, by making such a disposition or investment of that portion of the proceeds of sale affected by the executory devises, as will preserve its subjection to the contingencies imposed on it by the will.

It appearing to us, that the substantial merits of the case will not be determined by affirming the decree of the Chancellor, and that the purposes of justice will be advanced by permitting further proceedings therein, and further testimony to be taken, in pursuance of the 6th sec. of the act of December session, 1832, entitled, “A supplement to the act, entitled an act, to define and enlarge the powers of courts of equity,” the cause will be remanded to the court of Chancery.

REMANDED TO THE COURT OF CHANCERY.

Plater vs. Scott.—1834.

GEORGE PLATER vs. WILLIAM B. SCOTT.—June, 1834.

P, who was guardian until 1817 to the plaintiff, received in 1828 from the board of commissioners appointed to distribute the fund paid to the *United States*, by virtue of the convention of 1826, the sum of \$3000, as compensation paid by the *British* government for certain captured and deported negroes formerly the property of the plaintiff, and paid the same to the defendant. The slaves were carried off from the State, during the war in 1814, by the naval officers of *Great Britain*. The plaintiff petitioned for the benefit of the insolvent laws in 1822, and was finally discharged in 1823. The defendant was his permanent trustee. The action was brought to recover the \$3000, and the county court instructed the jury, that if they should believe the plaintiff was *regularly and legally discharged under the insolvent laws of this State*, then the plaintiff was not entitled to recover. Upon appeal this instruction was reversed, and the permanent trustee held entitled to the funds.

It is error in the county court to submit to the belief of the jury, a question of law, or a mixed question of law and fact.

APPEAL from Saint Mary's county court.

This was an action for money had and received, instituted by the appellant against the appellee, on the 17th *February*, 1829. Issue was joined upon the plea of *non-assumpsit*.

At the trial the plaintiff proved, that the late *John R. Plater* (who was guardian to the plaintiff during his minority, which terminated in 1817) received from the board of commissioners, appointed to distribute the fund paid to the *United States*, by virtue of the provisions of the convention of 1826, commonly called *Gallatin's Convention*, the sum of about \$3000, in the year 1828, as compensation paid by the *British* government for certain captured and deported negroes, formerly the property of the plaintiff; and paid the said sum of money to the defendant, *Scott*, as trustee for the creditors of the plaintiff, in 1828. The defendant then proved that the negroes deported, as aforesaid, by the naval officers of *Great Britain* in the year 1814, in the late war, were the property of the plaintiff, prior to his petition for the benefit of the insolvent laws of *Maryland*. That the plaintiff petitioned for the benefit of those

laws on the 10th of *August*, 1822, and was finally discharged on the 14th of *March*, 1823. That the defendant was appointed his permanent trustee on the day of his final discharge, and having given bond as such with approved security, entered upon the discharge of his duties; and that the negroes above referred to were included in the schedule returned by said *Plater*. The defendant then prayed the court to instruct the jury, that if they should believe from evidence that the plaintiff was regularly and legally discharged under the insolvent laws of this State, upon his insolvent petition as aforesaid, that then the plaintiff is not entitled to recover. This instruction (*STEPHEN*, Ch. J., and *KEY*, A. J.) gave,—the plaintiff excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before *BUCHANAN*, Ch. J., and *MARTIN*, *ARCHER*, and *DORSEY*, J.

Vernon H. Dorsey, for the appellant, contended.

1. The court below erred, in submitting the legality of the plaintiff's discharge to the jury. It was a question of law, or a mixed question of law and fact, and in either aspect the decision was wrong.

2. The plaintiff at the time of his discharge had not such an interest in the subject of the controversy, as could be assigned, either according to the ordinary principles of the common law, or the insolvent laws of this State. The capture of the negroes by the naval officers of *Great Britain* extinguished the plaintiff's right of property, which became vested in the *British* government. The right *flagrante bello*, to seize property as an equivalent for damages, losses, &c. incurred in the prosecution of a war, is recognised by *Grotius* and other writers.

The question is, had *Plater* any assignable right at the time of his discharge. If he had any interest, it was in virtue of the treaty of peace between *Great Britain* and the

United States. By that treaty *Great Britain* stipulated to restore any negroes, or other private property taken during the war. That government having denied her liability to pay for the deported negroes captured during the war, the *United States* renewed the negotiation on the subject in 1818, which led to a convention, by which the two governments agreed to refer the subject to some friendly power, by whom it was decided, the indemnity should be made, for all property within the waters of the *United States* at the time of the ratification of the treaty. Difficulties occurring in the execution of this award, *Mr. Gallatin* in 1828, negotiated a treaty which was received by the *United States* in fulfilment of the treaty of *Ghent*, so far as it referred to making indemnity for private property; and for the distribution of the fund received under this treaty, a board of commissioners was created by *Congress*.

The contract then under which the money was paid, was between two sovereign powers, to which *Plater* was no party. His claim on the *British* government for the capture of his property was a mere possibility, dependent wholly upon its will.

There was no *jus prosequendi*. No remedy without which a right cannot be said to exist. 3 *Black. Com.* 123. 2 *Swanst.* 613. The money paid was not founded on right, but on the policy of the nation. The right in *Plater*, if it can be called a right, is analogous to the hope of succession in an heir. 1 *Madd. Ch. Pr.* 549. 3 *Merrivale*, 671. 1 *Preston on Estates*, 75, 76. 4 *Wash. C. C. R.* 576. 1 *Taunt.* 578, 602, 614. 2 *Barn. and Ald.* 242.

If not a mere naked possibility, it was a possibility coupled with an interest, which, by the principles of the common law, cannot be assigned. 1 *Preston on Estates*, 76. 2 *Preston Abstract of Titles*, 93. 4 *Wash C. C. R.* 576.

A possibility coupled with an interest may, it is true, be assigned by the commissioners of a bankrupt, but this power is derived from the statutes of bankruptcy, and not from

Plater vs. Scott.—1834.

the common law. 3 *Petersd.* 488, *in note.* 1 *Pr. Wms.* 132. 4 *Wash. C. C. R.* 570. 1 *Peters' S. C. R.* 219.

The case reported in the authorities last cited, is similar to that now before the court, and the bankrupt's assignee was adjudged to be entitled to the property, not upon the principles of the common law, but because of the bankrupt laws of the *United States*, the 18th section of which is in part a transcript of the *English* statute, and is broad enough, as is also the 5th section, to transfer every description of interest, or *possibility of profit*, growing out of property. But the provisions of our insolvent laws, under which the trustee claims, are widely different. *Act of 1805, ch. 110, sec. 1; 1812, sec. 6.* The words "of every description in law and equity" are omitted; as are also "possibility of interest."

The property and rights mentioned in our laws, are property and rights which can be asserted, and enforced in a court of justice, and not every *possibility of profit* and interest.

Plater, at the time of his petition had no right to the property in question, which could be enforced in a court of justice. His interest, whatever it might be, depended upon the will of an independent government, which acknowledges no law, but its own sense of right, and bids defiance to any authority but its own. Neither was the fund in question, acquired by "gift, descent, or in a course of distribution:" it was not a pure *donation*, without consideration; but resulted from a treaty between independent nations, providing compensation to individuals whose property was wrested from them during a period of war. In strictness, it can neither be called the payment of a debt, or a gift. 2 *Swanst. Rep.* 613.

If however it can be regarded as property liable for the insolvent's debts, still, it does not go to the trustee, but to the insolvent himself, liable to his creditors in his hands. 2 *Harr. and Johns.* 61.

Crain, for the appellee.

The county court did not intend to submit a question of law to the jury. There was no question as to the legality of *Plater's* discharge—It was not discussed or intended to be raised; it being conceded that he was regularly discharged in 1823, upon a petition filed in 1822. If however, this court should decide, that a question of law was left to the jury, (which is not admitted,) still it is insisted that no procedendo should issue, as the final judgment must be the same as the one already pronounced. *State use Johnson vs. Green*, 4 *Gill and Johns*. 381. The manner in which the plaintiff claims to recover this money from the trustee, is disclosed by the record, and this court should think that the claim cannot be supported; there can be no use in sending the record back for another trial. That the claim rested in the trustee for the benefit of the petitioner's creditors, he referred to *Jones vs. Roe*, 3 *Term. Rep.* 88. 1 *Ves.* 98. *Comegys and Petit vs. Vasse*, 1 *Peter's S. C. R.* 193.

But conceding that a doubt may be entertained upon this question, will the plaintiff in this action be permitted to recover from his trustee? This is an action for *money had and received*, which is an equitable action. And the question is, whether the court in this form of action will permit a party to recover a fund, which upon every principle of equity and justice, should be distributed among his creditors, from the payment of whose claims his person has been discharged. The action for money had and received, is governed by the true equity and conscience of the case. *Douglass*, 137, 138. In equity and conscience *Plater* can have no claim to the fund.

By the 5th sect. of the Act of 1805, ch. 110, any property acquired by *gift*, descent, or in his own right, by bequest, devise, or in *any course of distribution*, shall be liable to the payment of the insolvent's debts. The money in question then, having been acquired in a course of distribution, is a fund for the payment of creditors, and being in the hands of the trustee to be so applied, this court will not

permit it to be taken from him, and diverted to a different purpose.

ARCHER, J., delivered the opinion of the court.

We are of opinion, that the court erred in submitting to the jury the question of the legality of *Plater's* discharge under the insolvent laws.

Under the circumstances detailed in the bill of exceptions, the sufficiency of *Plater's* discharge was a mixed question of law and fact.

The right of the permanent trustee of *Plater* to the funds in controversy, arising from the treaty with *Great Britain*, cannot we think be well questioned.

As all claims of the insolvent, are transferred by the insolvent laws to the trustee, we conceive the term claim, sufficiently extensive and comprehensive, to embrace the matter in controversy.

Although the right to indemnity for the deported slaves, could not be enforced by any process whatever, the claim existing against a sovereign power, yet it was not the less a claim on that account. Sovereign states are presumed always ready to do that justice, which, in the case of citizen against citizen, is always coerced by the process of judicial tribunals.

It cannot with propriety be contended, that the lawless deportation of slaves, and plunder of property on our waters during the late war, conferred upon the enemy any right thereto; and the treaty by granting indemnity, furnishes demonstrative proof, that these transactions were contrary to all the usages of civilized warfare.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Lyles vs. Hatton, *et ux.*—1834.

WILLIAM H. LYLES vs. HENRY D. HATTON, *et ux.*—
June, 1834.

When an executor negligently leaves an estate unsettled for ten years, and then suffers the accounts of the estate to remain before the auditor of the court of equity, for several years before any statement was reported, he is justly chargeable with interest.

After an estate had been ten years in the hands of an executor, he was notified of a claim on the part of the *United States*, and upon his application to the Orphans court, they permitted him to retain a sum in his hands to abide its event. The claim of the *United States* was ultimately defeated. *Held*, that under the circumstances, the order of the Orphans court ought not, like an injunction against payment, to be regarded as a sufficient ground for the suspension of interest, upon the sums due the distributees of the estate.

A judgment at law may be enjoined in part in equity, and when the circumstances require it, a court of equity should perpetuate the injunction as to part, and dissolve it as to the residue.

Upon a bill against husband and wife, the wife never having answered, this court upon appeal refused to pass any final decree, but remanded the cause under the act of 1832, ch. 302.

A mistake in the calculation of interest in the auditor's report, ought regularly, under the act of 1825, to be pointed out to the court by exception, else this court will not notice it on appeal.

APPEAL from equity side *Prince George's* county court.

The bill in the present case was filed by the appellant against the appellees, on the 8th of *September, 1825*. It charged, that the appellant became the executor of his father, *William Lyles*, in the year 1815, and passed his final account with the Orphans court of *Prince George's* county, in the year 1823, by which there appeared to be due to *Emily*, the wife of the appellee, as one of the distributees of his testator, the sum of \$3022 23; which sum however was subject to many deductions, on account of property purchased by the appellees, at the sale of the personal estate of his testator, and for money paid them by the complainant, on account of said distributive share. That after the passage of said final account, a claim against the deceased's estate, was exhibited by one *Jacob Hoffman*, amounting to \$2022 44, subsequently to

which, (at April term, 1824,) judgments were obtained in *Prince George's* county court against the complainant, and the surety in his testamentary bond, at the suit of the state of *Maryland*, for the use of the appellees; which judgment it was agreed, should be released on the payment of such sum as a certain *Trueman Tyler* should ascertain to be due, by the first of August, 1824. And it was further agreed, that if by the first of August thereafter, the Orphans court should direct the complainant to retain in his hands the amount of *Hoffman's* claim, that then the said *Tyler* should credit the complainant with the proportion thereof to which the appellees' distributive share would be subject. That complainant not knowing that the 1st of August was the time limited for the Orphans court to act upon *Hoffman's* claim; and that court not having had a sitting for a long time thereafter, the matter was neglected; in consequence whereof, the said *Tyler*, whose report was made on the 1st of March, 1825, gave the complainant no credit for any portion of *Hoffman's* claim, but reported to the county court that there was due him the sum of \$526 46, with interest from the 4th of June, 1825, and costs. That judgment having been entered up upon this report, and execution issued thereon, the complainant obtained an injunction to stay proceedings upon it, which was afterwards dissolved; upon the terms, that the appellees should give a bond, conditioned for the repayment to the complainant of the proportion of *Hoffman's* claim, payable by the appellee, if the same should be established. That very shortly before the obtention of said injunction, suit was instituted against the complainant, as the executor of his father, by the *United States*, for a large sum of money which was claimed of his father, as the surety of *Thomas A. Digges*, the executor of *John Fitzgerald*, the collector for the port of *Alexandria*. That the issue of this suit is doubtful, but result as it may, the expense of conducting the defence will be considerable. That the appellees are well aware of the existence of this suit, but notwithstanding, have issued an execution to co-

Lyles vs. Hatton, et ux.—1834.

erce the payment of their whole claim, refusing not only to secure the complainant against eventual loss, but also to contribute any thing to the defence of the suit. *Prayer*, that complainant may be permitted to retain in his hands, of the amount of the judgment obtained by the appellees, the proportion of the claim preferred by the *United States*, for which they would be liable, and their proportion of the expense of defending the suit, until the same shall be decided; and in the mean time, that they may be restrained by injunction from enforcing their judgment. An injunction was accordingly granted.

The answer of *Hatton*, filed in May, 1827, stated, that the suit of the *United States* spoken of in the bill, had been decided in favor of the defendant, as appeared by a short copy of the judgment of the Circuit court exhibited with the answer; and as the pendency of that suit was the only equitable circumstance stated in the bill, he prayed that the injunction might be dissolved.

The court overruled the motion to dissolve, and sent the case to the auditor, who made his report and statement to the October term, 1830; by which, after charging the complainant with the amount of the appellees' judgment, with interest from the 4th June, 1823, and the costs of the suits, against himself and his surety, and crediting him with various payments, and the appellees' proportion of the expense of defending the suit of the *United States*, &c. there appeared to be a balance due the appellees of \$150 76, on interest from August 6th, 1830.

Accompanying this report of the auditor, sundry receipts of the appellees, for payments on account of their distributive share was filed, and also the following order of the Orphans court, passed on the 13th August, 1825. "Ordered by the court, whereas, *William H. Lyles*, executor of *William Lyles*, late of *Prince George's* county, deceased, has made application for authority to detain in his hands, the amount of a claim against the estate of his testator, which has been notified to him since the passage of his final ac-

Lyles vs. Hatton, et ux.—1834.

count, but before the payment over of the residue to the legatees mentioned in the will, which said claim is by the *United States* against his testator as security of *Thomas A. Digges*, for the sum of \$8446 09, with interest for at least ten years. It is thereupon ordered by the court, that the said *William* retain in his hands a sufficiency of the assets of his testator to discharge the above claim, in case it should be recovered against him, in due course of law." The complainant excepted to this report.

1. Because the auditor allowed the defendants interest on the amount of their judgment.

2. Because he has allowed the defendants their costs at law, and in equity.

3. Because he has not allowed the complainant his costs.

The court at January term, 1831, overruled these exceptions; ratified the report, and statement of the auditor; dissolved the injunction, and dismissed the bill with costs. From this decree, the complainant appealed to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and ARCHER, and DORSEY, J.

Mundell, for the appellant contended, that the order of the Orphans court of the 13th of August, 1825, was in strict conformity with the provisions of the act of 1798, and not only protected the appellant against the demands of the residuary legatees of his testator, but made it obligatory upon him to retain the necessary amount, to abide the issue of the suit by the *United States*; and that the fund being thus tied up in his hands for a specific purpose, it was not competent for him, to appropriate it for any purpose whatever. The appellant then, having no power over the fund, could not make it productive, and it would therefore be unjust to him, to make him pay interest upon it. An executor or administrator is never chargeable with interest on money in his hands, when there is no person to whom he

Lyles vs. Hatton, *et ux.*—1834.

can properly pay it; or where the Orphans court has directed it to be retained, to meet outstanding claims. *State vs. Handy use Townshend*, 7 *Harr. and Johns* 42. *Wilson vs. Wilson*, 3 *Gill and Johns*. 20. The answer in this case admits the right to retain the money, to await the issue of the suit by the *United States*, for it only asks the dissolution of the injunction, because of the final decision of that suit.

T. F. Bowie, for the appellees.

To entitle a complainant to relief in equity against an award, some corruption, partiality, misconduct or mistake on the part of the arbitrators, must appear, or a court of equity cannot interfere with it. In the absence of allegations or proof to that effect, the award is binding and conclusive, and cannot be set aside by the court, however unreasonable and unjust it may appear. *Underhill vs. Van Cortland*, 2 *John. C. R.* 339. *Todd vs. Barlow*, 2 *Ib.* 551. *Henrick vs. Blair*, 1 *Ib.* 101. *Shepard vs. Merrill*, 2 *Ib.* 276. *Roosevelt vs. Thurman*, 1 *Ib.* 220.

The arbitrator by the terms of the reference to him, was given until the first of August, 1824, to ascertain the amount due the appellees, and it does not appear that he filed his award until the first of March, 1825. The appellant, therefore, had ample opportunity of presenting before the arbitrators, all just claims to credit or discount, and if he neglected to make the application to the Orphans court, spoken of in the terms of reference, in relation to *Hoffman's* claim, within the time required, it was his own fault, and as the Orphans court never did at any time pass any order in relation to said claim, he never had any equity against the appellees, so far as it regards that claim.

No agreement upon the part of the appellees made with the appellant, subsequent to the filing of the award by the arbitrator, in reference to the said award, is made the ground of equity in the appellant's bill, and none is pretended ever to have existed; but the only alleged ground of equity is, that long after the filing of said award, and the

rendition of the said judgment, a suit was instituted against the appellant, as the executor of his testator, by a creditor, and a subsequent order of the Orphans court by which the appellant was directed to retain in his hands assets of his testator, enough to meet the payment of said claim if it should be recovered against him—and it is insisted that the appellant is not properly chargeable with interest on the judgment recovered against him by the appellees during the time their distributive share was so retained by him in pursuance of said order of the Orphans court. The order of the Orphans court which is made the alleged ground of equity in the bill, was passed on the 13th August, 1825, more than ten years after the period when, by law, the appellant was bound to have settled up the estate of his testator; two years after the actual passage of his final account, and more than twelve months subsequent to the recovery of the judgment by the appellees for their distributive share of said estate. It does not appear that this extraordinary delay on the part of the appellant, was occasioned by any act of the appellees, nor is it alleged that it was authorised by any action of the Orphans court—no application for such purpose appears ever to have been made to said court, and it is difficult to conceive how the appellant can properly derive any aid from the occurrence of a circumstance which owes its existence to his own negligence and delay. If the appellant had paid the several distributees their respective proportions of the personal estate of his testator, at the time the law required him to do so, no subsequent judgment could have been recovered against him by a creditor who had failed to give him the notice required by law; and it is equally clear, that the recovery of judgments by distributees for their distributive shares, after the time limited by law for creditors to present their claims, will bar the recovery of subsequent judgments, by creditors who have not complied with the requisitions of the law, by giving the necessary notice; and it was competent for the appellant to have availed himself of this defence in the suit

Lyles vs. Hatton, *et ux.*—1834.

instituted against him by the *United States*, and he did not need the aid of the Orphans court by the order of the 13th August, 1825. That order gave no additional security against the claim of the *United States*, for the fund which it purported to affect, was beyond the reach of that court; had been recovered by a judgment at law from the hands of the appellant by a court of competent jurisdiction, and if permitted to avail, would operate as an injunction to the recovery of the judgment by process of execution; and it cannot be pretended that Orphans courts possess any such powers; nor will they be allowed in any manner to interfere with the process of courts of common law. It follows, therefore, that the order of the Orphans court in question, was unnecessary, and so far as it authorised the appellant to retain in his hands any amount of the judgment which had been recovered by the appellees, illegal and extra judicial, and cannot, of course, furnish any ground for the interposition of a court of equity in the manner asked for in the appellant's bill.

The authorities referred to by the appellant, are not applicable here. It is not pretended that there was no person in existence, properly authorised to receive the amount of the appellees' judgment, for any portion of time. The bill on the contrary shews the fact to be otherwise, and it is difficult to conceive how such an idea should have been held by the appellant's counsel in the face of the facts as exhibited by the pleadings in the cause. In the case of *Wilson vs. Wilson*, 3 *Gill and Johns*. 20, the order of the Orphans court directing the administrator to retain assets in his hands to meet the contingency of a suit, was made before the passage of the final account, with the consent of all the parties interested, and at a period of time when the Orphans court might with propriety have passed such an order. No judgments for distributive shares had been recovered against the administrator at the time of the order, and the opinion of the court is founded upon the consent of parties, and the legitimate action of the Orphans court. But

no such assent of parties appears in this case, none is charged in the bill, and the fact is known to be otherwise.

The auditor's report is therefore correct, so far as it allows the appellees interest on the judgment at law and the costs of suit, both at law and in equity; but the third exception to his report presents a different point. At the time of the recovery of the judgment by the appellees against the appellant, two other judgments for the same amounts, and for the same distributive share, were recovered against his sureties on the testamentary bond, and the auditor has charged the appellant with the amount of the costs, which the appellees incurred in prosecuting said suits against the securities of the appellant. The appellant is clearly chargeable with the same, and his securities might have had recourse at law against him for the same. In a court of equity costs are awarded or not, according to the justice of the case, and always rest in the sound discretion of the court, to be exercised upon a full view of all the merits and circumstances of the case, and if the claim for costs rests upon substantial equity, they will be allowed. *Nicoll vs. Trustees of Huntington*, 1 *John. C. R.* 166. *Eastburn vs. Kirk*, 2 *ib.* 317. The allowance of such costs in similar cases has been the established usage of the court of Chancery, and to avoid circuity of actions, courts of equity will always decree against the party equitably liable for the same.

Duckett, on the same side.

The appellant in his bill for an injunction, of the 8th of September, 1825, admits that he settled his final account with the Orphans court of *Prince George's* county in 1823; and ascertained the distributive share of the appellees to be \$3,022 23 $\frac{1}{4}$. He alleges, however, that the distributive share of the appellees was subject to considerable deductions on account of property purchased by *H. D. Hatton*, at the appellant's sale, and on account of money paid by the appellant for the appellees to the other representa-

tives. The appellant having admitted that his final account was settled in 1823; without specifying the month or the day of its settlement; the auditor having charged interest from the 4th of June, 1823, the county court having ratified that report; the record furnishing no evidence that the final account of the executor was not settled on that day; this court are furnished with no data from which they can draw an inference that the final account was not settled on the 4th of June, 1823, and cannot, therefore, but conclude that the final account was settled by the executor, and the distribution struck on the 4th of June, 1823. The act of assembly, 1798, *ch.* 101, *sub-ch.* 10, *sec.* 10, is in these words: "Whenever it shall appear by the first, or other account of an administrator, that all the debts of, or claims against the estate, known by, or notified to him, have been discharged or allowed for in his account, it shall be his duty to deliver up and distribute the surplus or residue of the estate, as hereafter directed: provided that his power and duty with respect to future assets shall not cease, and after such delivery, the administrator shall not be answerable for any debt afterwards notified to him, provided he shall have advertised as herein before directed, unless assets shall afterwards come into his hands, which shall be liable for such debts." It was evidently, therefore, the duty of the executor to have delivered over to the appellees, the amount to which by law they were entitled, the very moment his final account was settled. The allegation that the appellees were in debt to the executor in an amount less than their distributive portion, does not vary the principle, for although it was competent for the executor to have retained in his hands for his own use, the sum actually due him from the appellees, yet he was equally bound at the same period of time, to have delivered over to the appellees the balance due them, after deducting the amount due him. The award of *Trueman Tyler*, which became a judgment of the court, did nothing more than ascertain the precise sum, which the appellant, on the 4th June, 1823, upon

Lyles vs. Hatton, *et ux.*—1834.

an equitable adjustment of their accounts, ought to have paid over to the appellees, and which sum is \$526 46.

Assuming then, upon the foregoing premises, that it was the duty of the appellant, on the 4th of June, 1823, to have paid over to the appellees the sum of \$526 46, we are led to enquire whether, having failed to do so, he was not bound to pay interest to the appellees on the aforesaid sum, so long as he failed to pay it over to the appellees. In this view of the case it is assumed, that *Trueman Tyler's* award barely ascertained the principal sum due on the 4th of June, 1823, from the appellant to the appellees; and did not embrace interest, mesne the 4th June, 1823, and the date of his award. It is also assumed, that the action of *Prince George's* county court by injunction, &c. did not impede the currency of interest, if interest began to run on the 4th of June, 1823. The proposition, therefore, now suggested is, did interest commence running on the principal sum of \$526 46, on the 4th of June, 1823. It is contended that it did. Interest is chargeable on all liquidated sums from the instant the principal becomes payable. *Blaney vs. Hendricks*, 2 *Wm. Blackstone's Rep.* 761. 3 *Wilson's Rep.* 205. If one detains the money of another wrongfully, he ought to pay interest. *Ekins vs. The East India Company*, 1 *P. Williams Rep.* 396. Interest is recoverable against a man who receives the property of another and holds it against his consent. *The Commonwealth vs. Crevor*, 3 *Binney*, 121. See also *Pope vs. Barret*, 1 *Mason's Rep.* 117. Where a party wrongfully obtains or detains the plaintiff's money, he is chargeable with interest from the time of his so obtaining or detaining the same. *Wood vs. Robbins*, 11 *Mass. Rep.* 504. See also *Lowndes vs. Collens*, 17 *Ves.* 27. Interest is due upon a balance ascertained by an auditor. *Crawford vs. Willing*, 4 *Dallas*, 289. In *Scott vs. Dorsey*, 1 *Harr. and Johns.* 235, the court of Appeals of this State allowed a legatee interest as against the executor, from the time the legatee became entitled to receive the legacy.

Lyles vs. Hatton, *et ux.*—1834.

It is upon the above authorities clear, that interest was due from the appellant to the appellees upon the amount ascertained by the award of *Trueman Tyler*, to have been due to the appellees on the 4th of June, 1823, until the same was paid by the appellant; that it commenced to run on the said sum the moment the final account was settled, and that it continued to run until paid, unless the award of *Trueman Tyler* embraced the interest which accrued, mesne the settlement of the final account and the award, or unless the currency of interest was arrested by the injunction of *Prince George's* county court, issued on the 8th of September, 1825. There is no proof in the record that the award of *Trueman Tyler* did embrace interest, which did accrue mesne the settlement of the final account and the award, and in the absence of any such proof, the inference is legitimate, that that award merely ascertained the principal sum due to the appellees on the 4th of June, 1823, more particularly since the award is so considered both by the auditor in his report of October, 1830, and by the court in their decree of January 1831, ratifying and confirming the report.

The only remaining inquiry upon the subject of the appellant's first exception to the auditor's report of October, 1830, is, whether admitting that interest did begin to run on the amount due the appellees on the 4th of June, 1823, it was not arrested by the injunction of *Prince George's* county court of 8th September, 1825. It is contended, that it was not arrested, and in support of the position the following principles and authorities are referred to. In *O'Donnell vs. Browne*, 1 *Ball and Beatty*, 262, it is laid down as a general rule, that where a party is prevented by the court from proceeding to establish his right at law, it is the duty of the court to see that no injury arise to him in consequence of its interference: therefore, where an annuitant was restrained by injunction from proceeding at law, to recover the arrears of a rent charge, interest was allowed. The same principle is recognised, in *Pulteney vs. Warren*, 6 *Ves.* 92, 93, in which case *Ld. Eldon* says, "If there be

Lyles vs. Hatton, *et ux.*—1834.

a principle upon which courts of justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party against whom the relief is sought."

In a court of equity, a debt secured by bond may be carried beyond the penalty of the bond, if the debtor has by injunction restrained the creditor from proceeding at law, and there has been no misconduct on the part of the creditor. *Grantt vs. Grantt*, 3 Russel, 598. Creditor prevented from obtaining judgment by act of court of equity, put in the same situation as though he had. *Pulteney vs. Warren*, 6 Ves. 93.

Upon the above authorities it appears therefore most clearly, that the action of the court of equity did not arrest the currency of interest, if interest was running at the time the injunction, which was subsequently dissolved, issued.

The exception is a general exception to the allowance of any interest at all. It does not ask for a rejection of the auditor's report, because interest should not have been allowed upon *Trueman Tyler's* award, mesne the settlement of the final account and the judgment of award, but it wholly denies the propriety of allowing interest upon the award, for any period of time whatever. If interest was allowable for any period of time whatever, the county court were right in overruling the first exception of the appellant, which sought to upset the audit because not one cent of interest was allowed for any period of time upon *Trueman Tyler's* award. It has been shewn that the injunction did not arrest the currency of interest. The award was a general judgment, and as such carried interest as a matter of course, where the creditor, as in this case, has been guilty of no impropriety. Admit therefore, merely for the sake of argument, that the award of *Trueman Tyler* did embrace interest, mesne the settlement of the final account, and the time of rendering the award; still interest was due, and therefore properly allowable by the auditor, from the time

Lyles vs. Hatton, *et ux.*—1834.

the judgment on the award was rendered, until the judgment was paid, unless a court of equity will by its own act, occasioned by the appellant, put a vigilant creditor in a worse condition than he would have been in, independently of the action of the court.

The county court were evidently right in overruling the second and third exceptions of the complainants, since the appellees were entitled to receive from the appellant, their costs upon the suits instituted originally upon his administration bond, and also entitled to receive from the appellant, their costs in this suit, to which they were subjected by the pertinacity of the appellant, in all of which suits the appellant was defeated, and to which he submitted without appeal.

The counsel for the appellant in support of the appellant's first exception to the auditor's report, has referred to two cases decided in *Maryland*, the case of *Handy vs. the State use of Townshend*, 7 *Harr. and Johns.* 42; and the case of *Wilson vs. Wilson*, 3 *Gill and Johns.* 22; neither of which cases it is conceived, have any bearing upon the one under consideration; the principles invoked in the former, although perhaps good law, was not a decision of the court of Appeals, but the decision of a single judge at *nisi prius*, not appealed from; and simply alleges that an administrator or executor is not chargeable with interest upon a distributee's portion, which he kept in his hands during the minority of the distributee, there being no guardian to receive the fund. In the latter case, the Court of Appeals refused to allow interest upon money detained by the administrator, with the approbation of the parties, and under the sanction of the Orphans court, to meet suits which it was thought would probably occur. In this latter case the money was retained (unlike the case under consideration) not after, but before the settlement of the final account with the Orphans court.

DORSEY, J., delivered the opinion of the court.

We think the county court was right in overruling the exceptions filed to the report of their auditor. The negligence of the appellant, (which is wholly unaccounted for,) in leaving the estate unsettled from the year 1815 to 1825, and then in suffering the case to remain before the auditor for several years before any statement was reported to the court, render him justly chargeable with interest. The order of the Orphans court, under the circumstances in which it was made, ought not, like an injunction against payment, to be regarded as a sufficient ground for the suspension of interest. But the court erred, in the mode which they adopted to carry their decision into effect. Instead of decreeing that the complainant pay the respondents, the amount ascertained to be due by the auditor's statement, and that the injunction granted be dissolved, and the bill dismissed with costs to the complainant; the decree ought not to have dismissed the bill, but perpetuated the injunction, as to all the residue of the judgment, except the amount ascertained to be due by the auditor's report, as to which, the injunction should have been dissolved; and for that sum with the accruing interest, the defendants should have been left at liberty, to proceed on their judgment at law. Under the present decree for the unqualified dissolution of the injunction, the defendants are left at liberty to coerce the payment of their entire judgments at law, and in addition thereto have a right to collect by execution, the amount awarded to them by the auditor's statement. This it is apparent was not the intention of the county court.

But there is another defect in the proceedings, which will prevent this court from passing a final decree in the case. *Emily Hatton* has never answered the bill, nor does any reason appear in the record why she has not been compelled to do so.

There is an error in the auditor's calculation of interest on the sum awarded to be due by *Trueman Tyler*, having

Burke vs. Negro Joe.—1834.

calculated interest from the 4th of June, 1823, instead of the 4th of June, 1825. But this mistake forms in the present aspect of the case, no ground for the reversal of the decree. It is not so specifically pointed out by any of the exceptions, pursuant to the provisions of the act of 1825, as to satisfy this court, that the court below made any determination thereon.

That *Emily Hatton* one of the defendants may have an opportunity of answering the complainant's bill; we feel ourselves enjoined by the provisions of the Act of Assembly of 1832, *ch.* 302, to remand this case to *Prince George's* county court, as a court of equity.

REMANDED FOR FURTHER PROCEEDINGS.

JOHN M. BURKE vs. NEGRO JOE.—*June, 1834.*

A negro in this State is presumed to be a slave; and on a petition for freedom, must prove his descent from a free ancestor, or that he has been manumitted by deed or will.

Deeds and patents though directed by law to be recorded within a limited time, and to have no legal effect unless such requisitions are complied with, yet to quiet possession, the court upon a proper foundation being laid for it, will direct the jury to presume the existence of such papers, and that all legal requisitions had been complied with to give them effect.

Deeds of manumission are not exceptions to the general rule.

The presumption of a deed to give freedom, must be founded on acts inconsistent with a state of slavery, *known to the owner*, and which can only be rationally accounted for, upon a supposition that he had intended to free his slave.

When the exercise of apparent freedom is without the knowledge of the owner of a slave, or where the owner died soon after the slave commenced to act as free, and no administration had been taken out, no presumption of freedom can be drawn.

Circumstances under which a jury may presume a deed of manumission stated.

All cases of presumption may be rebutted or explained, and if the foundation of fact upon which the presumption is claimed does not exist, the presumption must fail.

The law construes no act to be tortious but from necessity.

APPEAL from *Anne Arundel* county court.

The appellee in this case, filed his petition for freedom on the 6th of July, 1832, against the appellant.

1. At the trial the petitioner gave evidence to the jury, by legal and competent witnesses, without objection on the part of the defendant, that about the year 1784, negro *Dinah* the grand-mother of the petitioner, and negro *Lavy* or *Lavinia*, the mother of the petitioner, and the only child of said *Dinah*, were the slaves of a certain *William Mackubin*. That in the year 1797, the said *Dinah* and *Lavy*, were going at large as free-women, living, acting, and passing in all respects as such, in the neighborhood of the said *William*, and within three miles of his residence, and with his knowledge, and many other such acts; renting small tenements, owning property, contracting debts, being distrained on for rent, and supporting themselves and children; and they so continued acting and living, in the free and undisturbed possession of their liberty, from that time until the death of the said *William Mackubin*, in or about the month of May, 1805. That the said *William Mackubin*, by his last will and testament, devised and bequeathed all his property, real and personal, to his wife *Elizabeth* for life, remainder to his children. That the said *Elizabeth* obtained letters of administration, with the will annexed, of the said personal estate of the said *William*, gave bond for the payment of all debts, and legacies, took possession of the property of said *William*, and settled up his estate. That the said *Elizabeth* died in the year 1824, and from the death of the said *William* until her death, she never set up any claim to the said *Dinah* and *Lavy*, or any of their issue, or attempted to hinder or molest them, or any of them in the enjoyment of their freedom, although they all lived during the whole of that time in the neighborhood of the said *Elizabeth*, within the aforesaid distance from her residence, and frequently nearer, acting as free persons as aforesaid, with her knowledge, and although some of them

Burke vs. Negro Joe.—1834.

were frequently at the place of her residence, acting as free persons there. That immediately after the death of the said *Elizabeth*, the children of the said *Elizabeth* and *William*, and tenants in remainder of the property of the said *William*, took possession thereof, and of the property of said *Elizabeth*, sold it, paid the debts of said *Elizabeth*, and divided the residue among themselves. That none of the said children set up any claim or title to the said *Lavy* or her issue, or to any of the issue of the said *Dinah*, (she having died in the life-time of the said *Elizabeth*,) or hindered, or molested them, or any of them, in the enjoyment of their freedom, although they lived and acted as aforesaid, in the neighbourhood of the said children, within about the aforesaid distance, and with their knowledge, in the undisturbed enjoyment of their freedom until the month of June, 1832, when the defendant, who is one of the heirs and personal representatives of said *William* and *Elizabeth*, took out letters of administration *de bonis non*, on the estate of the said *William*, and letters of administration on the estate of the said *Elizabeth*, and seized and took possession of the petitioner, and all the issue of the said *Dinah* and *Lavy*, claiming them as slaves for life.

The petitioner further proved, that the said *William Mackubin*, was until his death a hearty and active man, superintending his farm and transacting his own affairs, frequently walking to places in the neighborhood more than three miles distant from his residence. That during the life of said *Elizabeth*, some of the issue of said *Lavy* and *Dinah*, and *Lavy* herself, were frequently at the place where she resided, and were sometimes hired by the family in which she lived, and received wages as free persons; and that neither the said *William*, during his life-time, after the year 1797, until his death, nor the said *Elizabeth* after his death, nor any of their children after her death, until the year 1832, ever set up any claim to any of them, but treated them as free persons. That the said *Dinah* and *Lavy* had numerous issue who are now living. That at

the time the said negroes commenced acting and living as free persons as aforesaid, they were of healthy constitutions, and capable by labor to procure to themselves sufficient food and raiment, with the other requisite necessities of life, and under the age of forty-five years, and able to maintain themselves and so continued.

Upon this evidence the defendant prayed the court to instruct the jury, that they ought not to presume that the said *Dinah* was legally manumitted by the said *William Mackubin* in his life-time.

But the court (DORSEY, Ch. J., and KILGOUR, WILKINSON, A. J.) refused the prayer and instructed the jury, that from the evidence aforesaid (if they believed it) they might presume that the said *Dinah* was legally manumitted by the said *William Mackubin*. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, and ARCHER, J.

Alexander, for the appellant.

It is admitted by the counsel for the appellant, that the enjoyment of freedom for the period proved, under the circumstances of notice and assent proved, will warrant the presumption that the ancestor of the petitioner was legally manumitted by *William Mackubin* in his life-time, if such presumption can legally be made from the enjoyment of freedom for any space of time, and under any circumstances of notice and acquiescence whatever; but he insisted that a negro once a slave, can make out his right to freedom against his former master, only by showing a manumission by deed, or last will and testament made according to the acts of Assembly in such cases provided. 5 *Harr. and Johns.* 190. 1 *Phil. Ev.* 126.

The going at large of these negroes originally was a violation of the law, and a right thus commencing is not per-

Burke vs. Negro Joe.—1834.

fectured by length of enjoyment. 2 *Con. Rep.* 620. *Act* 1715, *ch.* 44; 1787, *ch.* 33. 2 *Harr. and Johns.* 176. 3 *Stark. Ev.* 1215. 7 *Wheat.* 102. 2 *Con. Rep.* 615. *Act* 1827, *ch.* 112, *sec.* 34; 1796, *ch.* 67; 1752, *ch.* 1.

Brewer and Randall, for the appellee.

A deed of manumission may be, and ought to be presumed by the jury, when the testimony adduced establishes a sufficient ground for such a presumption.

The doctrine of presumptions is universal, embracing every fact which it may be required to prove, and this case does not constitute an exception. 3 *Stark. Ev.* 1254. 10 *Serg. and Rawl.* 391. 6 *Harr. and Johns.* 351, 144. 3 *Harr. and McHen.* 103. 1 *Harr. and Johns.* 172. 2 *Gill. and Johns.* 114. 7 *Wheat.* 109. 12 *Mass. Rep.* 400. 7 *Wheat.* 355. 7 *Cranch.* 290. 12 *Wheat.* 590. 6 *Munf.* 159. 5 *Harr. and Johns.* 190.

The act of 1752, *ch.* 1, shows by its preamble, that the right of manumission was previously exercised, and the act instead of conferring, was restrictive of it.

The case of *Hall vs. Mullin*, 5 *Harr. and Johns.* 190, proves, that freedom may be conferred without an express grant by deed or will; and it would seem therefore to follow, that it may be inferred from circumstances, inconsistent with any other than a condition of freedom. 2 *Pick. Rep.* 245.

The permitting of the ancestors of these negroes to go at large as free persons without manumission, would have been culpable on the part of their former owner, and as the law always presumes that to be done, the omission of which is culpable, the manumission will be presumed. 19 *Johns. Rep.* 145. 2 *Barn. and Ald.* 386.

The presumption of freedom in this case, rests upon a variety of independent facts, any one of which is a sufficient foundation for the inference we would deduce from them. It stands therefore upon much stronger ground than would a presumption resting on a *dependent* train of circumstances,

where the falsehood of one, would necessarily infer the falsehood of the whole. 1 *Phil. Ev.* 117.

It has been said that no right can be based upon an original violation of the law. But this assumes the very matter in controversy, which is, whether there was or was not a grant of the right of freedom.

MARTIN, J., delivered the opinion of the court.

A negro in this State is presumed to be a slave, and on an application for freedom, must prove he is descended from a free ancestor, or that he has been manumitted by deed or will.

It is not pretended in this case that the petitioner is descended from a free ancestor, nor has a deed of manumission or will been produced, but it is contended from the facts disclosed in evidence, a deed of manumission ought to be presumed, and that would entitle him to his freedom.

Although this case has received an ingenious and elaborate investigation by the counsel engaged in it, it would seem to be embraced within a very narrow compass.

The inquiry is, whether in any case or under any circumstances, a jury may be directed to presume a *deed of manumission*, and if so, whether the facts proved in this case, would justify such presumption?

The general doctrine of presumption as applied to patents, deeds, &c. is too well established now to require an examination. Although directed by law to be recorded within a limited time, and to have no legal effect unless such requisitions are complied with, yet to quiet possession, the courts, upon a proper foundation being laid for it, will direct the jury to presume the existence of such papers, and that all legal requisitions had been complied with to give them effect. Can any reasonable suggestion be made, why deeds of manumission should be exempt from this law of presumption? That every other paper required by law to be recorded, may under circumstances be presumed, but that a deed of manumission alone, although standing upon

the same principles should form an exception to the rule? No authority has been produced to shew such an exception, and we think none exists.

The presumption of a deed to give freedom, must be founded upon acts inconsistent with a state of slavery, known to the owner, and which can only be rationally accounted for, upon a supposition that he had intended to free his slave.

A negro going at large and acting as free for any length of time, will not *per se* be a sufficient foundation to presume a deed, because he might be in that situation without the knowledge of his owner, or there might be no person legally authorised to claim him. If this exercise of apparent freedom was without the knowledge of the owner, no supposed acquiescence by him could be deduced from it, nor could the assent be presumed, where the owner, at the time the acting as free commenced, soon after died, and no administration was taken out on his estate.

If those presumptions be correct, it must be admitted, the case before us is of the strongest character to justify the presumption.

The grand-mother and mother of this petitioner, were the slaves of *William Mackubin*, and they and their descendants have been at large acting as free, from the year 1797, to 1832. They were permitted to own property, contract debts, rent farms, and support themselves and children until the death of *Mr. Mackubin*, in 1805, *living during that time, within three miles of his residence*. By his last will and testament, he bequeathed all his property to his wife for life, remainder to his children. She administered, and took possession of his property, settled up the estate, and died in 1824. After her death, the children of *William Mackubin*, who were tenants in remainder of his property, took possession of it, and of the property of *Elizabeth Mackubin*, sold it, paid the debts of *Elizabeth*, and divided the residue among them. They all knew *Dinah* and *Lavinia* had been the slaves of *William Mackubin*,

and that they had for many years acted as free, yet no claim was set up to them, but they were permitted to enjoy unmolested their freedom.

It has been contended, that this testimony although at first it appears irresistible, does not afford a sufficient foundation to presume a deed, because the negroes going at large may have been a violation of the act of 1787, *ch. 33*, by which it is enacted "that any person who shall permit or authorise any slave belonging to him or herself, in his or her own right, or possessed in the right of another, to go at large, or hire him or herself within this state, shall incur the penalty of five pounds current money per month, except ten days at harvest," and that so far from justifying the presumption of a deed, it subjected *Mr. Mackubin* to a prosecution.

It cannot be doubted, that all cases of presumption may be rebutted or explained, and if you can prove by facts the foundation on which the presumption is claimed did not exist, it must fail. In this case, the exercise of freedom by going at large, &c. may have had a lawful commencement, or it may have been an offence under the act of 1787, which would subject the owner to a prosecution. In the absence of all testimony to show it was without right it will be deemed lawful, for the law will never construe an act tortuous, unless from necessity. It will consider the act lawful, the commencement and contrivance of which is *not proved* to be wrongful. 7 *Wheat.* 107.

So far from there being evidence in this case to prove the going at large was a violation of the law, the contrary may be fairly presumed from it. By the act of 1787, every person permitting their negroes to go at large, is subject to a prosecution. *Dinah* and *Lavinia* are admitted to have been the slaves of *William Mackubin* in 1797. They were permitted to go at large to the time of his death, eight years; and yet we hear of no prosecution against him for a violation of this act. After his death, his widow permitting them to go at large, became amenable to this law. She

Hoffman, Adm'r of Owings, *et al.* vs. Cromwell.—1834.

lived until 1824, yet no prosecution is exhibited against her, nor against the representatives in remainder, who after her death still allowed them to go at large and act as free.

JUDGMENT AFFIRMED.

HOFFMAN, Adm'r of OWINGS, *et al.* vs. CROMWELL.
June, 1834.

O devised certain lands to his son W, and his heirs, upon condition that he and they, or the person or persons to whom the estate devised may eventually pass "maintain my daughter R, or pay £ 60 current money a year, for her maintenance during her natural life." W having failed either to maintain R, who was an idiot, or to pay the £ 60 during his life, his real estate including that devised, was sold upon the application of creditors, by the court of Chancery, for the payment of his debts. In the distribution of the proceeds of sale, a large sum was found due to R for arrearages of principal, and interest of the £ 60 legacy. C, who had maintained R for many years and until her death, petitioned the Chancellor to deduct the amount found due to her, to be paid to him, upon the ground that he had a *lien* on the fund. H, the administrator of R, resisted this petition claiming the fund. HELD, that C was entitled to it.

In this case it further appeared, that the mother of R, who survived her husband, by her will devised all the residue of her estate to her eight daughters, to be equally divided between them; and that the portion of her estate bequeathed to her daughter R, should be laid out in the purchase of bank stock in the name of R, and her daughter U the wife of C, should receive the dividends and apply the same to the support of R during her natural life; that R was to be removed to the house of U, and from the death of R the stock was given to U, as a compensation for her trouble in providing for R. And in case U should die before R, then she was to be removed to the house of D, and the testator then gave to D the same power to receive dividends, with the same direction as to their application as in the case of U, and after the death of R, then the stock was to go to D, as a compensation for her trouble. The Chancellor upon the application of C allowed him \$500 per annum for the support of R, which exhausted all the dividends upon her bank stock, and left a larger balance due than the proceeds of the annuity. HELD, that the balance of the annuity should be paid to C, out of the proceeds of the real estate devised to W, to the amount of the Chancellor's allowance.

Hoffman, Adm'r of Owings, et al. vs. Cromwell.—1834.

APPEAL from the court of Chancery.

By the will of *Samuel Owings*, executed in the year 1803, certain lands and property are devised to his son *William*, upon the following conditions,—“To hold the same to him the said *William Owings*, his heirs and assigns forever, upon the express condition, that he, and they, or the person or persons to whom the estate devised to the said *William Owings*, may eventually pass, maintain my daughter *Rebecca*, or pay sixty pounds current money a year, for her maintenance during her natural life.

William Owings, the devisee, having failed either to maintain the said *Rebecca*, (who was an idiot,) or to pay the £60, provided by the will of her father for that purpose, and being dead, his real estate including that devised to him by his father *Samuel Owings*, was, upon the application of certain of his creditors, sold for the payment of his debts, by the decree of the Chancery court.

In the distribution of the proceeds of the sale, there was found due to the aforesaid *Rebecca*, (the deceased,) for arrearages of the principal, and interest of the £60, the sum of \$7044 77.

In this state of the case the appellee, *John Cromwell*, who had maintained and taken care of the said *Rebecca* in his family, from the year 1810 to the year 1828, when she died, petitioned the Chancellor to direct, that the amount so found due to her, should be paid to him, upon the ground that he had a lien upon the fund.

The appellant, *Hoffman*, who had taken out letters of administration on the estate of *Rebecca Owings*, and several of her representatives objected to the allowance of this claim; insisting that the amount exceeded a reasonable remuneration to the appellee, for the services and expenses incurred by him; and further, that the amount ascertained to be due to the said *Rebecca*, should be paid to her administrator, and by him accounted for in the usual way. And they further contended, that the following clause in the will of *Deborah Owings*, the mother of *Rebecca*, executed

in 1810, was intended as a substitute for the provision for her support, and that consequently the appellee had no right whatever to any part of that provision.

“Item—I give and bequeath all the rest, &c. of my estate, to my eight daughters, to wit, *Urath Cromwell* (the wife of the appellee) *Eleanor C. Moale*, *Sarah Winchester*, *Rebecca Owings*, *Deborah Hoffman*, *Frances Moale*, *Mary Cromwell*, and *Ann Winchester*, to be equally divided between them; and it is my will and desire, that the portion of my estate above bequeathed to my daughter *Rebecca*, shall as soon as convenient after my decease, be laid out by my executor in the purchase of bank stock, and the said stock when so purchased, shall be held in the name of my said daughter *Rebecca*. And I do hereby authorise and empower my daughter *Urath Cromwell*, to demand and receive the interest or dividends arising from the said stock, and to apply the same to the support and maintenance of my said daughter *Rebecca* during her natural life, it being understood, that my said daughter *Rebecca*, is to be removed to the house of my said daughter *Urath Cromwell*, and from and after the decease of my said daughter *Rebecca*, I give and bequeath the bank stock aforesaid, unto my said daughter *Urath Cromwell*, as a compensation for her trouble in providing for, and taking care of my said daughter *Rebecca*. But in case my said daughter *Urath* should die before my said daughter *Rebecca*, then, and in such case my said daughter *Rebecca*, to be removed to the house of my daughter *Deborah Hoffman*,”—and the testatrix then gives to the said *Deborah*, the same power to receive the dividends on the bank stock, which the preceding clause gave to *Urath Cromwell*, with the same direction as to their application; and after the death of *Rebecca*, the said stock was to become the property of *Mrs. Hoffman*, as a compensation for her trouble in taking care of the said *Rebecca*.

The auditor having stated an account, in which after crediting the appellee for the support, maintenance, clothing, and medical attendance of the said *Rebecca*, from the 12th

Hoffman, Adm'r of Owings, *et al. vs. Cromwell*.—1834.

of December, 1810, to the 19th of August, 1828, at the rate of \$500 per annum, and the interest thereon; and charging him with the dividends on the bank stock, according to the will of *Deborah Owings*, the mother, reported a balance due the appellee of \$11,484 97.

This account was submitted to *Bland*, Chancellor, upon exceptions filed by the appellants; and his honor, having by his order of the 8th of November, 1831, overruled the same, and directed the amount due *Rebecca Owings*, from the estate of *William Owings*, to be paid to the appellee; the appellants brought the record upon appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J.

Moale and *Alexander*, for the appellants, contended,

1. That if the appellee has any claim upon the fund in question, it must be for an amount much less than has been allowed him; independently of any objection to the claim founded upon the provision in the will of *Deborah Owings*, which they insisted, was a full compensation to the appellee for the maintenance of *Rebecca*, and was so intended by the testatrix.

2. As the decree in the case provides for the sale of the estate of *William Owings* deceased, for payment of his debts, the proper and only subject of litigation in the suit, so far as the parties to this appeal and the representatives of the said *William* are concerned, is the validity of the claim of the said *Rebecca*, against the estate: and it is not competent for the appellee, to engraft into this suit any litigation respecting the validity of his claim, as a creditor of said *Rebecca*. 2 *Mad. Ch. Pr.* 192. 1 *Chitty Dig.* 281.

3. That the amount due *Rebecca*, should be directed to be paid to her administrator, *Hoffman*, to be applied by him in due course of administration.

Hoffman, Adm'r of Owings, *et al. vs. Cromwell*.—1834.

Heath and *Mayer*, for the appellee.

The question is, whether the fund shall be paid to the appellee, the only creditor, or to *Hoffman* the administrator. This money has been brought into the court of Chancery, by the exercise of its peculiar and appropriate jurisdiction. It is the money of an idiot, and is the *very* fund provided by her father for her maintenance; and consequently, paying it to the appellee, who did in fact maintain her, is giving it the very destination designed by him from whom it was derived. No reason can be given, why the appellee, who is unquestionably entitled to the fund, should be turned from the court of Chancery, and driven to the circuit of suing at law, where his claim might be defeated by limitations. The court of Chancery having had jurisdiction of the subject will retain it. 17 *Johns. Rep.* 384.

The appellee having done that which *William Owings* was bound to have done, is entitled to be substituted for him, as respects the fund. 1 *Johns. Ch. Rep.* 409. 2 *Ib.* 554. 4 *Ib.* 123. He, *William Owings*, was merely the trustee of this money appropriated by the father for the support of his daughter, and the appellee having done that which the fund was designed to have done, is entitled to receive it. It belongs to him in virtue of an equitable lien upon it. 1 *Pr. Wms.* 482, 538. 1 *Ves. Jr.* 277.

When the court of Chancery is in the possession of the assets of a deceased estate, it will administer them, and not send the creditors to a court of law. 4 *Johns. Ch. Rep.* 619. 2 *Atk.* 363. 3 *Ib.* 363. *Rebecca Owings*, though she was entitled to the enjoyment of the fund, never had a right to its possession, and if she had no such right, her administrator can have none. If *Rebecca* herself was alive, the court would not direct this money to be paid to her, but to the appellee, in consideration of his having done that which the fund was designed to have done, and it follows therefore, that her administrator cannot recover it.

The provision in the will of *Mrs. Deborah Owings* cannot be regarded as a substitute for this. If it had been

Hoffman, Adm'r of Owings, *et al. vs. Cromwell*.—1834.

made in favor of the appellee himself it should be regarded as merely cumulative. But such is not the fact, it is in favor of his *wife*, *Mrs. Cromwell*, for her care and attention. It cannot therefore be considered as a satisfaction, either in whole or in part of the claim of the appellee. If *Mrs. Deborah Owings* can be supposed to have intended to provide a substitute, for the provision made by the father for the support of his daughter, you must suppose she intended to relieve *William Owings* from that burden, a supposition which is wholly inadmissible.

DORSEY, J., delivered the opinion of the court.

The first question we are called on to decide in this case is, whether the annuity provided by *Samuel Owings*, in his last will and testament, for the maintenance of his idiotic daughter *Rebecca*, and now in the Chancery court in virtue of a decree for the sale of the land, on which it was a charge, is to be paid over to the administrator of *Rebecca*, or to the person by whom during life she was maintained? The entire annuity, in the opinion of the court, not being more than sufficient to discharge the claim for her maintenance, it is unnecessary for us to inquire, whether her administrator, had there been a surplus, would have been entitled to claim it. The solution of the first question mainly depends upon the true construction of that part of the testator's will, by which the annuity is created. If it were a general bequest to *Rebecca Owings*; or if when received by her administrator, it would constitute a fund applicable to the payment of her debts generally, there cannot be a doubt of his right to receive it. No principle of law being more conclusively settled as a general rule, than that a creditor, as such, cannot sue either at law or in equity the debtor of his deceased debtor. If this on the part of *Cromwell* be such a suit, it is clearly not sustainable.

The words of the will applicable to this subject are as follows; "to hold the same to him the said *William Owings*, his heirs and assigns forever, upon the express condi-

Hoffman, Adm'r of Owings, *et al. vs. Cromwell*.—1834.

tion, he and they, or the person or persons to whom the estate devised to the said *William Owings* may eventually pass, maintain my daughter *Rebecca*, or pay sixty pounds current money a year for her maintenance during her natural life." In the event of *William Owings* or those claiming under him failing to maintain *Rebecca*, to whom is this provision for her maintenance to be paid? The intention of the testator must solve this inquiry. Was it to be paid to *Rebecca*? Had such been the design of the testator, he would have used apt words to express it. Such could not have been his intention knowing as he did, that his unfortunate daughter from mental imbecility was incompetent to the management of the fund provided for her maintenance. The object of the devisor, was the application of the annuity to the comfort and maintenance of his daughter. That being accomplished, it was immaterial to him by whom the expenditure should be made. He designates no person for that purpose. What then is the natural justice and equity of the case? What the common sense and fair interpretation of the bequest? Why, that he who maintains *Rebecca*, is to receive the annuity provided for her maintenance. In the contemplation of a court of equity, this clause in the will is to be regarded in the same light, as if in so many terms it had ordered the annuity to be paid from time to time, to him by whom *Rebecca* should be maintained. Who upon the ordinary principles of human action, could the testator suppose would expend his time and money in the maintenance of this unhappy being, unless he were authorised to claim the fund provided for that purpose? It has been said, that such claim might well be made of her administrator. Can it be supposed for a moment, that such an idea entered the imagination of the testator? Was it his intention that this annual stipend should be withheld from him for whom it was designed, until it could be claimed of her administrator after the death of *Rebecca Owings*? Who would have maintained her on such terms? If then her maintainer was entitled to reimbursement out of this fund in the life-time

of *Rebecca*, where was he to seek it? Whom could he sue to obtain it? The answer to these interrogatories is obvious. He is the creditor of the fund, having a clear equitable lien upon it, which can be asserted only in a court of equity. The death of *Rebecca* works no change in his rights or his remedy.

But it has been insisted, that the provision made by *Deborah Owings*, the mother of *Rebecca*, was intended as a substitute for that in the will of her deceased husband. There is nothing in the circumstances of the case, in the terms of the bequest, or in the nature and extent of the provision made, clearly indicating such to have been her intention. On the contrary if we advert to the great inadequacy and contingent character of the fund provided by the mother, it is fair to presume that she designed it, not as the substitution of a new and adequate provision for her daughter's maintenance, but as an auxiliary to the inadequate provision heretofore created by the father. We attach no weight to the eulogies bestowed on the father, nor to the alleged improbability that he should have left an insufficient provision for his afflicted child. It was natural for him to suppose, nay, there is nothing improbable in the belief, that it may have been the express understanding between them, that the mother as well during her life as afterwards, should provide an additional fund for the maintenance of their daughter.

The only remaining objection which has been urged against the decree of the Chancellor, is the unreasonableness of the amount which has been allowed for maintenance. This cannot be regarded as an abstract question, dependent for its determination on any general rule or principle of law or equity, applicable to all cases where an allowance for maintenance is to be adjusted, but rests on its own peculiar circumstances, as every case of the kind must do. We look to the condition in life of all the parties connected with the question, their standing in society, their pecuniary abilities, the amount of the fund provided for maintenance,

Bentley, *et al.* vs. Cowman, *et al.*—1834.

the situation in which the person supported is placed, the character of the support designed and afforded, the habits and dispositions of the individual to be maintained. Having reference to all these considerations, we are of opinion, that the Chancellor was right in allowing to the complainant, the entire fund provided by both father and mother for the maintenance of *Rebecca Owings*. Neither testator nor testatrix ever contemplated that any portion of it should remain unexpended for distribution among her representatives.

DECREE AFFIRMED WITH COSTS.

CALEB BENTLEY, *et al.* vs. JOHN G. COWMAN, *et al.*—
June, 1834.

To a creditor's bill charging the insufficiency of a personal estate to pay debts; that the personal estate left by the intestate had been expended by the defendants, his brothers and sisters, *without administration*; that the debtor died without heirs of his body, and praying for a sale of the real estate of the deceased to pay debts and for *general relief*; the defendants pleaded, that they are not the heirs at law of the deceased debtor. The case being put down for hearing on bill and answer, the Chancellor dismissed the bill upon the ground, that the plea was a disclaimer by the defendants of all interest in the real property intended to be affected by it. *Upon appeal*, the decree was reversed, and remanded to Chancery for further proceedings.

A disclaimer is where the defendant renounces all claim to the subject of the demand made by the plaintiff's bill.

Pleadings in a court of equity are founded in the purest principles of ethics, and marked by frankness and fair dealing, and hence a disclaimer ought in terms to renounce all claim to the subject demanded by the bill.

When there is no formal prayer in a bill for an account, yet if facts authorising it are sufficiently charged, the prayer for general relief will entitle the complainant to an account, as where the defendant is charged with facts which make him an executor *de son tort*.

APPEAL from the court of Chancery.

On the 13th of August, 1832, the appellants exhibited their bill in the court of Chancery, alleging themselves to be creditors of one *Gerard Cowman* deceased; and pray-

Bentley, *et al.* vs. Cowman, *et al.*—1834.

ing for a sale of his real estate upon the ground, that his personal estate was inadequate to pay his debts; and that what there was of it had been expended by the appellees, his brothers and sisters, without any administration. The bill alleged, that the deceased died without heirs of his body, and after praying *subpœna* against the appellees, asked that his real estate might be sold for the payment of his debts, and for general relief.

The defendants pleaded, that "they are not the heirs at law of *Gerard Cowman*, deceased, in said bill mentioned, and they therefore pray the judgment of the court," &c.

At March term, 1833, *Bland*, Chancellor, after argument dismissed the complainants' bill upon the ground, that the above plea of the defendants, "must be considered as an absolute disclaimer of all interest in the real estate, in the proceedings mentioned." From this decree, the complainants appealed to the court of appeals.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

Boyle, for the appellants, contended.

1. A plea for want of proper parties ought to name them, or so describe them, as to enable the complainant to make them parties. *Fawkes vs. Pratt*, 1 *Pr. Wms.* 593. *Mosley*, 207. *Cook vs. Mancius*, 3 *Johns. Ch. Rep.* 427. 1 *Montg. Dig.* 146. 2 *Atk.* 692.

2. A bill is seldom dismissed for want of parties, but stands over with liberty to amend, and if dismissed should be without prejudice to another bill. *Coop. Pl.* 289. *Willis. Eq. Pl.* 571.

3. The plea in this case cannot be regarded as a disclaimer. 1 *Turn. and Venb.* 536. 1 *Coop. Pl.* 309. *Mitf.* 318.

4. If a plaintiff shows a probable cause for exhibiting the bill, he may pray a decree against the defendant and all claiming under him, upon the ground of disclaimer. 2 *Coop. Pl.* 210. 1 *Turn. and Venb.* 536. *Mitf.* 319.

Alexander, for the appellee.

1. The plea puts in issue a material allegation in the bill; to wit, whether the defendants are the heirs at law of *Gerard Cowman*; and such a plea if true, justifies the decree. The plea was not designed as a disclaimer, but the plea of a fact, requiring the dismissal of the bill.

2. The form of the plea is the proper one. It was not necessary that the defendants should designate who are the heirs at law. In fact, it might not be in their power to do so. *Coop. Rep.* 34, 38. 1 *Vern.* 473. *Newman vs. Wallis*, 2 *Bro. Ch. C.* 143. (*note.*) *Winn vs. Fletcher*, 1 *Ves. and B.* 159. The plea was not in abatement but in bar, and of course the bill was properly dismissed with costs. *Carroll vs. Waring*, 3 *Gill and Johns.* 491. There was no probable cause for filing the bill against these defendants. They plead that they are not the heirs at law, and by setting the case down for final hearing *the truth of the plea* is admitted. The proceeding was in *rem*, and there was no one before the court to defend the inheritance.

DORSEY, J., delivered the opinion of the court.

We cannot concur with the Chancellor, in regarding the plea of the defendants in this case as a disclaimer. A disclaimer is where a defendant renounces all claim to the subject of the demand made by the plaintiff's bill. *Coop. Eq. Pl.* 309. *Willis' Eq. Pl.* 617. 1 *Montg. Dig.* 92. 1 *Turn. and Ven. Cost's Chy.* 536. *Mitf. Pl.* 319.

Apply this test to the plea in question, and can it be considered a disclaimer? Is there any thing like a renunciation of all claims by the defendants to the subject matter demanded? It simply states, that they are not the heirs of *Gerard Cowman*, deceased. Thus perhaps impliedly denying to themselves all claim, as the heirs at law of the deceased, but leaving themselves at liberty to claim as his devisees. Indeed, if we were to give a literal construction to the plea, it might be interpreted as the assertion, that the defendants

Bentley, *et al.* vs. Cowman, *et al.*—1834.

were not "the heirs," that is, all the heirs of the deceased, but only a portion of them. We are well assured that such an evasion was not designed by the framer of this plea; but we advert to the defect as showing its want of that certainty which would justify the inference of disclaimer deduced from it by the Chancellor.

Pleadings in a court of equity are founded in the purest principles of ethics; are marked by frankness and fair dealing, and will not therefore tolerate such a partial, inferential disclaimer, as that which this plea can only be interpreted to be. A disclaimer must renounce all claim to the subject demanded by the bill. Not merely as in the present instance, deny all claim in a particular representative character, or to the full extent to which it has been charged, whilst the right to claim in a different character, or to a more limited extent is in no wise abandoned. But conceding it to be an unexceptionable disclaimer as to the land, and a bar to all relief sought in relation thereto, it would not warrant the decree dismissing the complainants' bill, the allegations in which, not only present a claim against the defendants in respect to the realty of the deceased, but also as executor *de son tort* of the personalty. And although there is no formal prayer for an account in the bill, yet the facts authorising it are sufficiently charged, and the prayer for general relief entitled the complainants to such an account.

The solicitor of the appellee admits, that upon the principle of disclaimer the decree of the Chancery court cannot be sustained, but he insists that it is sustainable upon his plea; which he alleges is a bar to all the equity set forth in the bill, and can in no wise be regarded in the light of a disclaimer. In support of this position we have been referred to two authorities. The first was the case of *Hitchins vs. Lander*, Coop. Ch. 34, where, on a bill filed to compel a defendant to proceed to the redemption of a mortgage, he pleaded, that there was not any mortgage as mentioned in the bill. The Ld. Chancellor allowed the plea. The

second case was that of *Gun vs. Prior*, 2 *Dick.* 657, in which on a bill filed for a discovery and production of title deeds, by one who stated himself in his bill to be heir at law, a negative plea that he was not heir at law, was overruled; the Ld. Chancellor declaring, that "heir or not heir, is a point in issue in the cause, which the court will not determine upon a plea; if disproved, having no title, his bill will be dismissed." Suppose the decision of the Ld. Chancellor in the latter case, had been the reverse of what it was; these cases give no strength to, and furnish no precedent for the plea before us. There the pleas were denials of the whole equity of the plaintiff's bills, and showed an utter destitution of all right to seek relief of any body, in the matters complained of. Here, the plea denies no portion of the plaintiff's equity. It impliedly admits it: but seeks to evade the relief asked for, by insisting, that the defendants are not *the heirs* of the deceased; or in other words, do not hold the land attempted to be charged, in the precise character ascribed to them in the bill. No precedent can be found for such a plea, and we feel no disposition to make one. It is not even a denial of any fact expressly alleged in the bill, but of a mere implication resulting from the facts alleged. The bill states "that the said *Gerard Cowman* had died intestate, and without heirs of his body, leaving the following brothers and sisters," naming the defendants, their heirship being left as a matter of legal inference. But had it been made the subject of express allegation, it would have given no additional sanction to the plea. The only object in pleading it which can be respectfully imputed, is what? To inform the Chancellor that the defendants claim no title to the land in question. If such were their design, it must be effected by a disclaimer. The Chancellor justly viewed it in that character, but gave to it an efficiency which it did not merit.

The objections we have urged against it as a disclaimer, apply to it with almost equal force as a plea; and are con-

State use of Barber vs. Hammond's Ex'rs.—1834.

clusive as to its insufficiency as such, to sustain the decree for the dismissal of the appellants' bill of complaint.

DECREE REVERSED WITH COSTS IN THIS COURT, AND THE CAUSE REMANDED TO THE CHANCERY COURT, THAT SUCH PROCEEDINGS MAY BE THERE HAD, AS THE NATURE OF THE CASE MAY REQUIRE.

STATE USE OF BARBER vs. PHILIP HAMMOND'S Ex'rs. June, 1834.

On the the 6th January, 1819, gave his bond to B, with M as his surety. M died leaving R his executor, who in September, 1819, gave a testamentary bond with P as his surety. On the 21st April, 1823, two suits were docketed, and judgments entered by confession in the *Anne Arundel* county court in the name of B, one being against C and the other against R, as executor of M. These judgments were rendered the first day of the term, and on the declaration in each case, was endorsed as follows, "file this and enter judgment with a stay of execution for three years."—Signed S attorney for plaintiff, and W attorney for defendant. In an action upon R's testamentary bond against the executors of P, his surety (of which said executors R was one) brought for the use of B, to recover the amount of the aforesaid judgment against R as executor of M, the issues were so made up as to present the questions: 1st. Whether the stay of execution upon the judgment against C, was so entered with the consent of R as executor of M; and 2nd. Whether the stay of execution entered upon the judgment against R as executor of M, was entered with the consent of the executors of P. At the trial the plaintiff prayed the court to instruct the jury, that from the facts in the cause they *might infer* the consent of R to the stay given to C, which instruction the County Court refused, and upon appeal by this plaintiff, the refusal was held to be erroneous, and the judgment reversed and *procedendo* awarded.

The entry of a stay of execution on a judgment against a principal debtor, without the knowledge and consent of a surety is a discharge of the surety; or if done after the death of the surety, without the knowledge and consent of his executors, is a discharge of them.

A party to the suit has a right to have a jury instructed in reference to their proper sphere of action, and to have them told what was legitimately within their province as the triers of the issues submitted to them; and when a court refuses without qualification to instruct them as to what they may infer from the evidence, (being so required,) it is error.

Where a defendant has given bond for payment of debts and legacies of a deceased person whose executor he was, in an action against him as executor, he cannot plead *plene administravit* or *nulla bona*, and this, though the action is not founded upon the bond for such payment. PER ANNE ARUNDEL COUNTY COURT.

APPEAL from *Anne Arundel* county court.

This was an action of *Debt*, instituted November 5th, 1829, in the name of the *State*, for the use of *George Barber*, surviving obligee of *John T. Barber*, against the appellees, as the executors of *Philip Hammond*, one of the sureties in the testamentary bond of *Rezin Hammond*, as the executor of *Matthias Hammond*.

To the declaration which assigned a breach in the non-payment of a judgment recovered by the plaintiff against the aforesaid *Rezin*, as the executor of *Matthias*, the defendants pleaded. 1. *Plene administravit* of the assets of *Matthias*, by *Rezin*. 2. Payment by *Rezin*. 3. Payment by *Christopher L. Gantt*, the principal in the debt to *Barber*, for which *Matthias Hammond* was surety, and the same debt, for which the aforesaid judgment was recovered against his executor *Rezin*. 4. Time given to *Gantt* the principal debtor. 5 and 8. Time given to *Rezin Hammond* for whom as *Matthias*' executor, the appellees' testator, was answerable as surety. 6. *Plene administravit* by the appellees of the *assets* of their testator *Philip*. And 7. *Nulla bona*.

Issues were joined upon the three first pleas. To the 4th, 5th, and 8th pleas, the plaintiffs replied, that the time was given with the consent of *Rezin Hammond*, and of the defendants as the executors of *Philip Hammond*, and to these replications there were issues.

To the 6th and 7th pleas, being the pleas of *plene administravit* and *nulla bona*, by the defendants as executors of *Philip Hammond*, the plaintiff replied; that the defendants had given bond for the payment of all his just debts and legacies, which made them answerable for all debts, claims, and demands, recoverable against them as executors.

The defendants demurred generally to the replications to the last foregoing pleas, and the plaintiff joined in demurrer. The county court (DORSEY, Ch. J., KILGOUR and WILKINSON, A. J's,) decided the replications to be good, and overruled the demurrer.

1. At the trial of the issues upon the 4th, 5th and 8th pleas, the plaintiff offered in evidence two several judgments in *Anne Arundel* county court, on the same cause of action, at the suit of *Barber*, the *cestui que use* of this action, against *Christopher L. Gantt* and *Rezin Hammond*, as executor of *Matthias Hammond*, the surety of *Gantt*; each rendered on the 21st April, 1823, in actions docketed by consent on the same day, with a stay of execution for three years in each case, upon the following order to the clerk, written upon the back of the declarations.

“*Mr. Green*, file this, and enter judgment, with a stay of execution for three years.

J. Shaw, for Plaintiff.

J. N. Watkins, for Defendant.”

He also proved, that at the time when the said order to enter the judgment in each case, and with the stay as aforesaid, was given, the said *J. Shaw* and *J. N. Watkins*, were attornies of the court, and their respective signatures were in their hand writing, and that the judgments are the same as those mentioned in the pleas. He also proved, that the said *Rezin Hammond*, the defendant in one of the suits, was one of the executors of *Philip Hammond*, against whose executors this suit is instituted, and contended, that the same was evidence to prove to the jury, that *Watkins* the attorney of record for the defendants in those causes, was authorised by the defendant, *Rezin Hammond*, to consent to the stay of execution in each case; and prayed the court to instruct the jury, that from the facts above stated, the jury might infer the consent of the said *Rezin Hammond* to the stay given to the said *Christopher L. Gantt*, as stated in the plaintiff's replication. The court refused the instruction, and the plaintiff excepted.

2. Upon the issue to the first plea of *plene administravit*, the plaintiff read to the jury the inventory of the personal estate of *Matthias Hammond*, returned by his executor *Rezin*, and four accounts settled by him with the Orphans court; the last of which passed on the 25th of March, 1831, exhibited a large balance in his hands.

The defendants then read to the jury the letters testamentary, which had been granted the said *Rezin* on the estate of *Matthias Hammond*, dated September 21st, 1819, and proved that on the 26th of August, 1820, the said *Rezin*, in pursuance of the order of the Orphans court, gave the usual notice to the creditors of his testator, to exhibit their claims on or before the 26th day of February, then next. And they further proved, that in conformity with an order of the said court, passed on the 27th of February, 1821, on the petition of the said *Rezin Hammond*, appointing two persons to make distribution of the personal estate of the said *Matthias Hammond* amongst his representatives, that the same was distributed, and the proportion allotted to each duly delivered over to the person entitled. And the plaintiff offered no evidence, that the said *Rezin Hammond* had had any notice of the aforesaid claim of *Barber* the plaintiff, on which the judgment in the declaration in this cause mentioned was rendered, before the date of the said judgment on the 21st of April, 1823; but he proved by the records of the Orphans court, that when the distribution before mentioned of the personal estate of *Matthias Hammond* was returned to that court, that the following order was passed. "March 6th, 1821. Ordered by the court, that this distribution be confirmed, provided the residue of the personal property be sufficient to pay the debts." The plaintiff then proved, that subsequently to the order of the court for the distribution of the personal property of the said *Matthias Hammond*, and after the alleged distribution thereof by them, to wit, at April term, 1823, the judgment by *Barber* against *Rezin* the executor of *Matthias Hammond*, was obtained as stated in the pleadings in this cause. And

the plaintiff further proved, that at the time of the application of *Rezin Hammond*, and the order of the court thereon, for the distribution of the personal estate of *Matthias*, the said *Rezin*, his executor, had passed no account whereby it could appear that all the claims against the deceased, known by, or notified to his executor, had been paid, retained for, or settled. That an account of the funeral charges had not been allowed by, or exhibited to the said Orphans court, nor had any commission been allowed to the said executor. And the plaintiff's counsel contended, that the said proof was inadmissible to prove under any issue in this cause, that the said *Rezin Hammond* as executor as aforesaid, had fully administered the assets of his testator, and had no assets to discharge the aforesaid judgment in favor of the said *Barber*, and prayed the court to instruct the jury.

1. That if the said executor had paid away the assets in a due course of administration, before this claim was notified or exhibited to him, he ought to have pleaded the same to the action by *Barber* against him as executor, and that the confession of the judgment in that action, was an admission that he had assets in his hands sufficient to pay the claim.

2. That the distribution of the assets among the personal representatives of the testator, furnished no defence to the executor in the former, nor to the defendants in the present suit, forasmuch as the persons who are alleged to have made the distribution, had no legal authority to make the same, it not being made as directed by the act of 1798, *ch.* 101, or any law of this state; or in pursuance of any authority conferred by law upon the Orphans court, in making distribution of the surplus of a deceased estate.

And 3. That neither in the former suit, nor in the present, is it pleaded that the executor had no notice of this claim, before the distribution of the assets as aforesaid; and it is not incumbent on the plaintiff to prove when he gave notice of his claim.

The court gave the instructions prayed, and the defend-

ants excepted; but the verdict and judgment on the 4th, 5th, and 8th pleas being for the defendants, the record was brought before the court of Appeals upon the appeal of the plaintiff.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and ARCHER, J's.

Randall, for the appellant.

The questions arise upon the 4th, 5th, and 8th pleas.

Upon the 4th plea the point is; whether there was evidence for the jury of the consent of *Rezin Hammond*, to the stay allowed on the judgment against *Gantt*, the principal debtor. The inference of consent, is fairly deducible from the existence of the judgment against him. He must be presumed to have consented that the judgment against him should be binding on himself, and available to the plaintiff; and he must also be presumed to have known in what manner and upon what terms, the judgment against his principal was rendered. These judgments were both confessed by the same attorney, and the defendants in each case are bound by his act, in which he is to be presumed to have acted by the authority of his clients. *Roscoe Ev.* 19, 30, 171. 1 *Johns. Dig.* 82. 2 *Stark. Ev.* 977. 4 *Campb.* 133. 2 *Powel on Mortg.* 583. 3 *Atk.* 34, 35. 4 *Russel*, 142. 3 *Eng. Ch. Rep.* 603. 5 *Ib.* 271. It is the duty of an attorney to disclose every thing to his client, which can influence his discretion, and in the absence of evidence to the contrary, he is to be supposed to have done so. 3 *Mason*, 418. The facts connected with these judgments show most clearly, that they were the result of one common consent and concert of action throughout, and every fair intendment should be made to support them.

The prayer of the plaintiff upon the facts was, that the jury *might* find the assent of *Rezin Hammond*, not that they *must* do so; and the court in refusing the prayer, necessarily created an impression on the minds of the jury, that it was not competent for them to find such assent. By refusing the prayer, the court decided upon the sufficiency of

the evidence, though its province was merely to decide its admissibility. If admissible at all, the court usurped the authority of the jury by deciding upon the effect of the proof. 5 *Harr. and Johns.* 478. 6 *Ib.* 478. 7 *Ib.* 36. 1 *Harr. and Gill*, 109, 321. 2 *Harr. and Gill*, 190. 2 *Gill and Johns.* 404, 419.

Upon the 5th and 8th pleas he insisted, that it was material to show, that *Rezin*, who was one of the executors of *Philip Hammond*, and the sole executor of *Matthias*, consented to the stay. This evidence was admissible to prove the whole issue upon the 4th plea, and supplied a material fact involved in the 5th and 8th pleas, and consequently was admissible under the issues growing out of those pleas.

The questions arising upon the demurrers to the plaintiffs replication to the 6th and 7th pleas are not before this court; the defendants not having appealed; but if they were, this court would not affirm the judgment, though it might be of opinion that the demurrers should have been ruled good, as by so doing the plaintiff would be denied the privilege of amending his replications.

Brewer and Alexander, for the appellees.

1. The first question is, whether the circumstances of this case are such, as would have justified the jury in inferring the consent of *Rezin Hammond* the surety, to the time given to *Gantt* the principal debtor. It is true the client is bound by the acts of his attorney, and consequently *Rezin Hammond* cannot gainsay the judgment against him, but it by no means follows that he consented to the judgment against *Gantt*. He is bound by the act of his attorney in his own case, but not by the act of the same attorney, in reference to judgments against other persons. 1 *Camp.* 140. If *Rezin Hammond* did consent to the stay of execution in the judgment against *Gantt*, that fact must have been in the knowledge of *Watkins*, the attorney, and as he was not called by the plaintiff, and is not shown to have been inaccessible to him, the presumption is against the existence

State use of Barber vs. Hammond's Ex'rs.—1834.

of the fact sought to be established. But the court did not reject the evidence, although it refused to instruct the jury that they might find the assent of *Rezin*. The court did not say, that the jury should not make the inference. It merely expressed an opinion on the subject, and in doing so, did not trench upon the just authority of the jury. *Showers' Par. Cas.* 111. 9 *Petersd.* 142. *Sir Thos. Ray.* 404. If the court usurped the authority of the jury, it was the result of the course pursued by the plaintiff. It was he who asked for an instruction, and not the defendants, who made no objection to the admissibility of the proof.

The prayer of the plaintiff in this exception, is confined altogether to the issue upon the 4th plea, in relation to the assent of *Rezin Hammond*, to the time given to *Gantt*. Nothing is said about the consent, alleged to have been given by the executors of *Philip Hammond*, to the stay given to *Rezin*, which is the subject of the 5th and 8th pleas, which have no connection whatever with the 4th. If then the court erred in the particular instruction given; still, as there could have been no recovery in this case, without proving the consent of the defendants, the executors of *Philip Hammond*; and as no proof whatever was offered of such consent, it would be futile to send the record back for a new trial. 3 *Gill and Johns.* 472.

The jury found for the defendants upon the 5th and 8th pleas, which go to the merits of the controversy; and therefore, though the plaintiff may have been entitled to the instruction he prayed for upon the 4th plea, still the judgment will not be reversed, as that would be giving the plaintiff an opportunity of disputing the same merits before another jury. The assent of *Rezin*, as one of the executors of *Philip*, would not be binding on the other executors. 1 *Strange*, 20. 2 *Ves. and Beam.* 51. And besides, there is nothing in this exception to show that *Philip Hammond* was dead, when the judgments were rendered against *Rezin* and *Gantt*.

If however, the defendants are wrong in the points growing out of the exception, still this court will not send the record back if it should be with the defendants, upon the demurrers, as they present independent and substantial grounds of defence, and present an insuperable bar to the final success of the plaintiff.

The question on the demurrer is, whether the giving a bond for the payment of debts and legacies, precludes all inquiry, at all times, and under all circumstances, in relation to assets. If it can have any such effect at all, it must be only when the suit is brought on the bond itself, and not as here, where it is introduced collaterally, to rebut a defence set up by the plea. In a case like the present, where the executor is not the residuary legatee, and has paid over the *residuum* to the such legatee, in obedience to the order of a court of competent jurisdiction, it would be the extreme of hardship to deny him the benefit of the plea of *plene administravit*.

Magruder, in reply.

Executors who have given a bond for the payment of debts and legacies, cannot plead *plene administravit*, whether the suit is on the bond itself, or on any obligation of their testator. The act of Assembly which has not been repealed, forbids proceedings in the first instance upon the bond. Before the bond can be sued, there must be proceedings on the original cause of action, against the executors as such; and as, if they elect to give a bond for the payment of debts and legacies, they are not required to settle accounts with the Orphans court, the creditor may not be able to recover his whole claim, if the plea of *plene administravit* may be filed. This must unavoidably be the result, if the plea of *plene administravit* is good, except where the suit is on the bond itself, as is contended on the other side. It has been said that there is nothing to show that *Philip Hammond* was dead, at the time the judgment against *Rezin* was rendered. If this be so, then the plea that the execu-

State use of Barber vs. Hammond's Ex'rs.—1834.

tors of *Philip* did not assent to the stay is not material, and the issue of course an immaterial one. The proof offered on the part of the plaintiff, was in support of the issue to the 4th plea, and should have been admitted, though it may have been inadmissible in support of the other issues; and if the county court erred in rejecting the prayer, this court cannot refuse to send the case back upon a speculation, that the plaintiff has no proof in support of the other issues. After the opinion of the court upon the 4th issue, which was fatal to the plaintiff's right to recover, he would not have been suffered to offer evidence in support of the other issues.

BUCHANAN, Ch. J., delivered the opinion of the court.

Christopher L. Gantt, it appears, on the 6th of January, 1819, gave his bond to *George and John Barber*, with *Matthias Hammond*, as his surety.

Matthias Hammond died, making *Rezin Hammond* his executor, who in September, 1819, gave a testamentary bond with *Philip Hammond* as one of his sureties, for the performance of his trust as executor.

On the 21st April, 1823, two suits were docketed, and judgments entered by confession in the *Anne Arundel* county court, with a stay of execution for three years in each case, in the name of *George Barber*, surviving obligee of *John Barber*; the first in order on the docket against *Christopher L. Gantt*, the principal obligor in the bond to *George and John Barber*, and the second for the same debt against *Rezin Hammond*, executor of *Matthias Hammond*, who was the surety of *Gantt*. These judgments were rendered on the first day of the term, and on the back of the declaration in each case is a memorandum to the clerk in these words; "Mr. Green, file this and enter judgment, with a stay of execution for three years." Signed, *J. Shaw*, for plaintiff, *J. N. Watkins*, for defendant, who were both attornies of that court.

Philip Hammond, who was the surety of *Rezin Hammond*, in his testamentary bond as the executor of *Matthias Hammond*, being dead, this suit is brought upon that bond, against the executors of *Philip Hammond*, of whom *Rezin* is one, to recover the amount of the judgment obtained against *Rezin* as the executor of *Matthias*.

The two judgments confessed to *George Barber*, surviving obligee of *John Barber*, the first by *Gantt*, on his bond of the 6th of January, 1819, and the second, for the amount of the said bond by *Rezin Hammond*, as the executor of *Matthias Hammond* the surety of *Gantt*, are set out in the bill of exception with the memorandum or direction to the clerk, written on the back of the declaration in each case, by the attornies of the respective parties, (who were the same persons in both cases,) to file the declaration and enter judgment with a stay of execution for three years.

There are *eight* pleas. To the 6th and 7th there were replications, and demurrers to the replications, which were overruled by the court; and the questions presented by those demurrers not being brought up by the exception taken at the trial, they are not now properly before this court, though attempted to be raised in the argument by the counsel for the appellees. Issues were joined on the *three* first pleas.

To the 4th, 5th, and 8th pleas there are replications, rejoinders and issues, making the 4th, 5th, and 6th issues. The 4th plea alleges, that the judgment against *Rezin Hammond*, as the executor of *Matthias Hammond*, was for a debt due from *Gantt*, for which *Matthias Hammond* was only the surety of *Gantt*, and sets out the judgment against *Gantt*, with the stay of execution for three years. The replication to that plea alleges, that the stay of execution given to *Gantt*, was with the consent of *Rezin Hammond*, as executor of *Matthias Hammond*, and the rejoinder denies the consent of *Rezin Hammond*.

The 5th and 8th pleas are substantially the same, and set out and rely upon the judgment against *Rezin Hammond*,

State use of Barber vs. Hammond's Ex'rs.—1834.

as the executor of *Matthias*, and the stay of execution entered upon that judgment. The replications to these pleas allege, that the stay of execution given to *Rezin Hammond*, was with the consent of the appellees as the executors of *Philip Hamond*, and the rejoinders deny their consent.

The questions then presented to the jury upon the trial of those three issues, were on the first, whether the stay of execution entered upon the judgment against *Gantt*, was so entered with the consent of *Rezin Hammond*, as the executor of *Matthias*; and on the other two, whether the stay of execution entered upon the judgment against *Rezin Hammond*, as the executor of *Matthias*, was so entered with the consent of the appellees as executors of *Philip Hammond*.

The entry of the stay of execution on the judgment against *Gantt*, was a giving of time to him, which if done in the life-time of *Matthias Hammond*, his surety, without his knowledge and consent, would have operated as a discharge of *Matthias*; and being done after his death, if without the knowledge and consent of *Rezin Hammond*, his executor, it equally discharges *Rezin*, and consequently *Philip Hammond*, his surety in his testamentary bond, if living, and being dead, his executors as such, the appellees in this case. It was necessary therefore, for the appellant to sustain the 4th issue on his part, that is, that the time given to *Gantt*, by the entry on the docket of a stay of execution for three years upon the judgment against him, was with the consent of *Rezin Hammond*, as the executor of *Matthias*. To prove such assent, and whether the jury was at liberty to infer it or not, from the evidence in the record, was the question submitted to the court at the trial; and is the only question presented to us by the bill of exception: the prayer preferred to the court by the appellant's counsel being, for its *instruction to the jury, that from the facts stated, they might infer the consent of Rezin Hammond, to the stay being given to Gantt, as stated in the replication.* Not that they were bound to infer the consent

of *Rezin Hammond*, but *might* infer it. That is, that the jury might, or might not infer it, from the evidence submitted to them as the judges of the effect of that evidence;—which instruction the court refused to give.

The appellant had a right to have the jury instructed with reference to their proper sphere of action; to have them told what was legitimately within their province, as the triers of the issue submitted for their decision, and that is, what was asked; that they might understand their duty and know that they were at liberty to infer from the evidence before them, the fact that was put in issue, if they should be of opinion, that the evidence was such as to afford the just and rational inference of that fact: and we think that the court erred in refusing to give the instruction asked for.

The consent of *Rezin Hammond* to the stay being given to *Gantt*, as alleged in the replication, was as competent to be proved by circumstantial, as by positive evidence. The same in that particular, as any thing else that may be proved by circumstantial testimony. The circumstances relied upon for that purpose in this case, that the suits and judgments against *Gantt* and *Rezin Hammond*, as the executor of *Matthias*, the surety of *Gantt*, and the stay of execution entered upon each judgment were on the same day—that they were amicable proceedings—that they were in the same court, and for the same cause of action—that they stand together upon the docket, the latter immediately following the former in order—that the stay of execution in each case is for the same time—that the judgments were voluntarily confessed, and at the first term—that the attorney for *Gantt*, and the attorney for *Hammond* was the same person—that the gentleman who was the attorney for the appellant in the suit against *Gantt*, was also the appellant's attorney in the suit against *Hammond*: and that the order to the clerk written and signed by them, as the attorneys for the respective parties, on the declaration in each case, to file it and enter judgment with a stay of execution

for three years is in the same words, as they tend to show a conventional arrangement between the parties, the result of their relative condition in respect to the cause of action, consummated through the agency of their respective attorneys, who were the same in both cases, and must be presumed to have known the views of their respective clients, and to have done their duty towards them, were circumstances pertinent to, and tending to prove the issue on the part of the appellant, from which the jury, whose province it was to weigh and balance the testimony, should have been left to infer, or not, the consent of *Hammond* to the stay of execution being given to *Gantt*, according as their judgment might direct.

If instead of an unqualified refusal to give the instruction prayed, which may have misled the jury, and induced the belief that they were not at liberty to infer the consent of *Hammond*, the court had informed them, that the whole case was before them upon the evidence, which it was for them to weigh, and that they might infer the consent of *Hammond*, or not, as they might, or might not believe such inference to be warranted by the evidence, or had instructed them in any form not calculated to mislead them one way or the other, but leaving them free and at large to weigh the testimony, and to make such inferences from it as they should believe it to warrant, such a direction would have been free from objection. But it seems to us that the unqualified refusal, in the presence and hearing of the jury, of the instruction asked for, if not equivalent to a direction that they were *not* at liberty to infer the consent of *Hammond*, or that the evidence was not of a character to justify that inference, was at least calculated to make one or the other impression upon their minds, and thus to mislead them.

It has been urged that as the finding of the jury, on the 5th and 8th issues, was in favor of the appellees, the judgment ought not to be reversed, and the case sent back under a *procedendo*, even although the court erred in refusing to

Evans, *et al.* vs. Iglehart, *et al.*—1834.

give the particular direction prayed, on the supposed ground, that the appellant cannot on another trial succeed against the defence relied upon in those issues, and therefore that he could gain nothing by the case being sent back, and would only be subjected to the costs of another trial. But we are not prepared to say from the state of the case as presented to us, that such would be the consequence.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOSEPH EVANS, *et al.* vs. RICHARD IGLEHART, JR. *et al.*
December, 1834.

S bequeathed all his real estate to his wife for life, and then devised as follows, "After her death, I will the tract of land H, together with all the personal property which may belong thereto *at her death*, to E and her heirs for ever. *Item*, I give to my wife for life, all my personal property not herein before disposed of, together with all the money of which I may die possessed; after her death I give the one half part of all my said personal property to the children of J, C and B, to be equally divided among them; and the same shall be divided immediately, or in a convenient time after the death of my said wife; the other half shall go to, and be vested in whomsoever my wife shall by last will direct. The widow appointed E to take under her power over the moiety of the personal property after her death. Some of the residuary legatees in remainder of S, filed a bill against the executors of S and his wife, and E the devisee of his wife for an account and distribution of S's personal estate among the parties entitled.

Upon the construction of the will IT WAS HELD,

- 1st. That the mere fact of giving the personal estate or the residue thereof, to one for life, with remainder over to another, does not of itself destroy the right of the legatee for life, under our testamentary system, to the enjoyment of the property *specifically*.
- 2d. That the intention of the testator ought to prevail, and in ascertaining that, the court will presume he had a knowledge of the testamentary law of *Maryland*, and the usages under it, and that he made his will in reference thereto, intending its execution accordingly.
- 3d. That the testator when he gave all his real and personal estate to his wife for life, did not intend that his executors should sell his personalty, and invest the same, and pay her its annual income for life.

- 4th. That the limitation over to E of all the personal property that might belong to the tract of land H at the death of the testator's widow, is conclusive evidence that the testator did not intend that the *general residue* of his estate should be sold and invested.
- 5th. When a surplus or residue bequeathed for life with remainder over, consists of money, or property whose use is the conversion into money, and which it could not for that reason be intended should be specifically enjoyed, nor consumed in the use—as a crop of tobacco or the like, an investment thereof must be made by the executor in some safe and productive fund; and most properly under the direction of the courts, so as to secure the dividends to the legatee for life, and the principal after his death, to the legatee in remainder.
- 6th. When any article of personalty, of such a nature *that its use is its consumption*, is specifically given to a legatee for life, with remainder over, the legatee for life takes the absolute property in the thing bequeathed, and the same rule applies when the consumable articles are comprised in the bequest of a general residue.
- 7th. That the wife of the testator S had no interest in the property devised by him except during her life. Upon her death one half of the balance of the personal property vested in the appointees named in her will, and the other moiety in the legatees in remainder designated in the will of S. The executor of the wife of S had no right to any portion of the property.
- 8th. A life estate in a chattel may be granted for life to one person, and the same, with *its issue* or *increase*, limited over to another; but this cannot be done but by express words or necessary implication. Applying this rule to the devisee of the personal property belonging to the tract called H, to E upon the death of the testator's widow, the *increase* thereof which became absolutely the property of the widow under the devise to her, did not pass to E. The testator only meant to devise what belonged to himself.
- Where an executor is called into chancery to account for and distribute the estate committed to him, there is no principle which will warrant the court in regarding the same claim, as at one time conveying specific property with the profits accruing therefrom—*then* by an equitable fiction as being converted into money, and bearing interest—and again as attaching on the specific property whereon it originated.
- Executors may claim an allowance for sums of money necessarily expended by them in clothing and maintaining the testator's slaves unable to work and maintain themselves, and similar allowances may be made to them in relation to slaves able enough to work and maintain themselves. Sometimes clothing is indispensable before they can be hired out, as slaves may be most profitably hired out, the executor furnishing clothing and maintenance—or where they are employed in finishing and preparing for market, crops on the testator's land, and by which the assets of the estate are sought to be increased.
- Where a defendant in chancery, liable originally for property in kind, is charged with interest on its value, the plaintiff by thus charging him, re-

linquishes his claim to the property, which rests absolutely on the defendant upon his payment of its value. An election being once made out to charge the defendant, cannot at a subsequent period be prospectively retracted or abandoned, where the property still remaining in the possession of the defendant may have become greatly enhanced in value.

Clover and hay growing on real estate are not emblements, and do not as such form a part of the personal estate of a deceased. These pass to the devisee, and not to his executor. Neither of these articles whilst growing are the offspring of *annual* labor and cultivation.

Crops planted or sown by the testator in his life-time and which are gathered during the summer and autumn next succeeding his death, constitute a part of the personal estate.

The increase and income resulting from personal property, specifically bequeathed, when the assets are abundant to pay debts and legacies, enure to the benefit of the specific legatee, and form no part of the general residue of an estate.

In *England* it is the duty of the executor or administrator to collect and speedily reduce into money the personal assets when not otherwise directed. Such never was the practice of executors and administrators in this State, and such a course of proceeding is wholly inconsistent with the policy and provisions of our testamentary system; and particularly inapplicable to slaves.

Executors and Administrators in *Maryland* are required to divide specifically, or in other words, "in kind," between the legatees and distributees of the deceased, except so far as a sale may have been necessary for the security and benefit of the estate in respect to the particular property sold, and the payment of debts, legacies, funeral charges, &c., or where they are unable to make a satisfactory distribution amongst the claimants, then under an order of the Orphans court they are to make sale of so much of the surplus as consists of specifics.

Where an executor or administrator in his representative character is sued in a court of law, assets are presumed, unless as a fact, it be put in issue by the pleadings; but in a court of equity assets in his hands must be alleged, and if denied or not admitted, must be proved.

Since the act of 1832, ch. 302, this court is prohibited from reversing or affirming any decree of a court of equity, on the ground that the complainant has not in his bill by proper averments, shown himself entitled to the relief which has been granted, unless such defect was presented by an exception to the consideration of the court below, but still when neither the pleadings nor proofs show that the complainant is entitled to the relief extended to him, this court may reverse the decree.

An executor is entitled to a commission on the excess of sales over the appraisement.

Accounts passed by an executor before the Orphans court, pending a controversy in a court of chancery between the executor and claimant, are ad-

Evans, *et al.* vs. Iglehart, *et al.*—1834.

missible in testimony before the auditor of the Chancery court; they are however only *prima facie* evidence.

It is error in a decree of the chancellor not to make a final adjudication upon the whole subject matter before him.

So where certain personal property had been devised to A for life, remainder to the children of J, C and B, and to such persons as A should appoint by last will, and the property had been converted into money by the executor of the testator. On a bill filed for an account and distribution of the fund after the death of the tenant for life, by some of the remainder men, it was held, that all the remainder men were necessary parties, and for want of them the cause was remanded to chancery under the act of 1832, ch. 302, and that the administrator of A did not represent the persons appointed by her last will.

APPEAL from the court of Chancery.

The present bill was filed on the first of November, 1831, by *Richard Iglehart*, and others of the residuary legatees in remainder of *James P. Soper* deceased, against *Joseph Evans*, his surviving executor; *Charles R. Stewart* administrator *de bonis non*, *C. T. A. of Ann Soper*, the widow of the said *James P. Soper*, *Elizabeth Evans*, the residuary devisee and legatee of the said *Ann Soper*; and others of the residuary legatees in remainder of the said *James P. Soper*, for an account and distribution of his personal estate among the parties entitled.

From the pleadings and proofs in the cause it appeared, that *James P. Soper* died in the month of May, 1826, having first duly made his will, appointing the appellee, *Joseph Evans*, and his wife *Ann Soper*, (since deceased) his executor; in which will, after directing the payment of his debts, and giving certain pecuniary legacies, are the following clauses.

“I will and bequeath to my beloved and affectionate wife *Ann Soper*, all the real estate and lands of which I am possessed, lying in *Anne Arundel* county, and which consists of three tracts, to wit, “*Soper Hall*,” “*Smith’s Desire*,” and about fifty acres of “*Westol’s Resurvey*,” for and during the term and continuance of her natural life. After her death, I will and dispose of the same in the manner fol-

Evans, et al. vs. Iglehart, et al.—1834.

lowing, that is to say, the tract of land called "*Soper Hall*," together with all the personal property which may belong thereto, at the death of my said wife ; I will and bequeath to *Elizabeth Evans*, the daughter of *Henry* and *Catharine Evans*, to her and her heirs forever. *Item*, I will and give unto my dear wife, for and during her natural life, all my personal property of which I may die possessed, and which is not herein before disposed of, together with all the money of which I may die possessed. After the death of my said wife, I give the one half part of all my said personal property to the children of *Esther Iglehart* before named ; and the children of *Charles Soper* and *Barton Soper*, to be equally divided among them, and the same shall be divided immediately, or in a convenient time after the death of my said beloved wife. All the other half part of my said personal estate, after the death of my said wife, shall go to and be vested in whomsoever my said wife shall by her will direct ; I hereby placing it in her power, and authorizing her to dispose of the same as she may see fit and proper."

Ann Soper, the widow, died in November, 1830, and her will, dated January 23d, 1829, after bequeathing specifically to different persons several slaves, contains the following clauses.

"I give, devise and bequeath, unto *Elizabeth Evans* and her heirs for ever, as well all the residue of said personal estate and property, which I have the power as aforesaid, (under the will of my husband) to limit and dispose of, as all the estate and property, which I, in my own right may die possessed of."

It also appeared that portions of the personal estate of *James P. Soper* were sold by his executors on the 14th of November, 1826, and the 16th January, 1827, under the authority of the Orphans court, and that a further portion was sold by the surviving executor, *Joseph Evans*, on the 14th April, 1831. And it was admitted that all the residue of said personal estate not included in the two first sales, remained in the possession of *Ann Soper*, the widow,

Evans, *et al.* vs. Iglehart, *et al.*—1834.

during her life. It further appeared, that certain other portions of the personal estate of the deceased, died, perished, and was consumed by his family—and that the whole remaining residue was sold by the surviving executor, and the proceeds brought into the court of Chancery, under an order passed on the 12th December, 1832, with the consent of all the parties.

The case was referred to the auditor, who stated several accounts founded upon inventories, lists of debts due the deceased, accounts of sales, and accounts settled by the executor, *Joseph Evans*, with the Orphans court; the third and fourth of which accounts were passed after the filing of the present bill, and the service of the *subpoena* on the defendant, *Joseph Evans*.

Exceptions were filed to these accounts and report, which raised among others, the following questions—

1st. Whether by the will of the testator, his widow *Ann Soper*, was not entitled to the specific use and enjoyment of the residue of his personal estate for life, after the payment of funeral charges, debts and legacies; so as to exempt the executors and surviving executor, from accountability to those entitled in remainder, for any waste, destruction, or consumption of said property, while in the possession of the legatee for life; or for any interest, hire, or profits of the estate, or increase thereof, during the life of said legatee for life.

2d. Whether the executors, or surviving executor is responsible for any gain which may have resulted from sales of the property made during the same period.

3d. Whether the accounts settled by the executors with the Orphans court, including those passed after this bill was filed, are not *prima facie* evidence of the correctness of the allowances contained in them.

4th. Whether the executors are not entitled to an allowance for the support of the negroes and stock which were sold, from the testator's death until the sale.

5th. Whether the executors are chargeable with certain crops and parts of crops, on the land of the testator at the

period of his death as assets; or whether they belong to the devisee for life, *Ann Soper*.

6th. Whether the surviving executor is entitled to a commission on the sales made by him under the chancellor's order of the 12th of December, 1832.

7th. Whether that half of the property, to which the legatees in remainder were entitled upon the death of the testator's widow, should not have been sold by his executors, and the interest on the proceeds only, paid her during her life.

8th. Whether the legatee for life did not take an absolute estate in those articles, of which the use was the consumption, notwithstanding the bequest over.

And afterwards on the 8th of February, 1833, his honor, *Bland*, Chancellor, passed the following order—

This case standing ready for hearing, the solicitors of the parties were fully heard, and the proceedings read and considered. Whereupon it is ordered, that this case be, and the same is hereby referred to the auditor, with directions to state such accounts as the nature of the case may require. From the estate of the late *James P. Soper*, now to be accounted for, the auditor will exclude the carriage and horses given to *Ann Soper*, and the slave *Nick*, who was left free; and also all the property belonging to *Soper Hall*, given to *Ann Soper*, for life, remainder to *Elizabeth Evans*, which he will consider as consisting only of the slaves, horses, cattle, sheep and hogs, with their increase, and the provisions and provender necessary and proper for their support; and all the plantation utensils and implements of husbandry, such as ploughs, carts and the like. The auditor will also deduct from the sum total of the assets remaining after satisfying the creditors of the deceased, the pecuniary legacy given to *James Soper*, and the pecuniary legacy given to *Margaret Soper*, with interest on each from the 1st of June, 1827. The auditor will allow to the executor, *Joseph Evans*, all sums of money necessarily expended by him in clothing and maintaining such of the slaves named in the inventories, as were not able to

Evans, et al. vs. Iglehart, et al.—1834.

work and maintain themselves, and in bringing up, maintaining and clothing the increase of the slaves, as long as they continued a charge. The residue, to be thus ascertained, will be considered as including all articles of which the use was the consumption; the slaves with their increase, and also the use, labor and hire of such of them as may have been hired out or retained by the executors, with the increase of the other animate personalty: the crops begun by the testator on the land held by him in his own right, or in right of his wife, such as melons, cantalopes, cabbages, potatoes, clover, hay, wheat, rye, oats, corn, and tobacco, which were sown, planted, or gathered during the summer and autumn next after his death; and every kind of personal property, with its accumulations, as it actually or would have existed on the first of November, 1827, but for the negligence, misapplication, or waste of one, or of both of the executors of the testator *James P. Soper*. The auditor will charge the surviving executor *Joseph Evans*, with the whole amount of the residue, together with interest on the value of so much thereof as was sold under the order of the 12th of December last, from the first day of November, 1827, until the 14th day of January last, when that sale was made; and with interest on the value of such other portions thereof as were not then sold, until the amount shall be satisfied by him. The auditor will state an account between the surviving executor, *Joseph Evans*, and the defendant, *Charles R. Stewart*, as administrator of the late *Ann Soper*, in which, he will award to *Stewart*, as administrator, all the interest on the aggregate value, with which the executor, *Evans*, is herein before directed to be charged, which accrued from the first day of November, 1827, to the third day of October, 1830; and he will charge the administrator, *Stewart*, in favor of the executor, *Evans*, with all such portions of the before described *residuum* of the personal estate of the late *James P. Soper*, and with the increase and accumulations thereof, as came to the hands of the late *Ann Soper*, and were misapplied, consumed, wast-

Evans, *et al.* vs. Iglehart, *et al.*—1834.

ed, or not accounted for by her. The auditor will allow to *Joseph Evans* as executor, a commission of five per centum, on the sales made under the order of the 12th of December last, and a similar commission on all other parts of his testator's estate, upon which no commission has heretofore been allowed. And then, after having first deducted the costs, expenses and commissions as usual, the auditor will distribute the balance among those entitled under the will of the late *James P. Soper*, who, as named in the bill of complainant, claim as legatees in remainder. According to these directions the auditor will make and report the necessary statements, from the pleadings and proofs now in the cause, excluding therefrom, however, the third and fourth accounts of the executor, *Joseph Evans*, passed with the Orphans court.

The report of the auditor made in pursuance of this order, was on the 25th of the same month duly ratified and confirmed by the chancellor; and appeals were prosecuted therefrom by all the parties, complainants and defendants.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER, and DORSEY, J.

A. C. Magruder and *Pinkney* for *Evans*, the surviving executor, and *Brewer* and *Randall*, for *Stewart*, adm'r of *Ann Soper*, and *Elizabeth Evans*, contended,

1st. That with reference to those articles of property of which the use has no separate existence, the widow had an absolute estate, notwithstanding the residuary clause. 3 *Merriv.* 190. 2 *Wms. Exrs.* 857, 8. 1 *Roper*, 209. 6 *Peters S.C. R.* 84. 2 *Paige*, 123. 5 *Johns. Ch. Rep.* 21, 334. 2 *Johns. Rep.* 243.

2d. In relation to the other articles, which are not consumed by the use, the widow was entitled to use them specifically during her life, and upon her death, the residuary legatees could claim nothing more than that which remained. They had no right to ask for a sale during her life.

Evans, *et al.* vs. Iglehart, *et al.*—1834.

This is the rule applicable to all cases of a bequest of personal property to one for life, with remainder to another. 3 *Ves.* 310. The testamentary system of *Maryland* discourages the conversion of personal property, and favors specific distribution. Act of 1715, *ch.* 39; 1798, *ch.* 101; *sub-ch.* 8, *sec.* 3, 4; *sub-ch.* 11, *sec.* 16; and *sub-ch.* 14, *sec.* 9.

3d. If however, the general rule be otherwise, there are circumstances in this case which will exempt it from its operation. The devise to *Elizabeth Evans*, of "*Soper Hall*," with the property upon it at the time of the death of the widow, and not of the testator, must necessarily except this case from any such general rule. To say that *Miss Evans* is to receive with the farm, not the negroes, stock, &c., but cash in lieu of such property; or that she must claim, not according to the will, the personal property on the farm at the death of the legatee, for life, but at the death of the testator, is to make a new will for him, instead of expounding that which he made for himself.

4th. The provisions of the will in favor of the widow herself, show manifestly the testator's intention, that the negroes, stock, &c. should be kept by her during her life, in order to cultivate the farm. It never could have been the design of the testator that they should be taken from her and sold, and the interest paid to her, that she might be enabled to purchase or hire other negroes and stock. If he had so intended, he would have so said; and to do so, upon any artificial rule of construction, would be defeating his benevolent purposes towards her. The provision in favor of the widow, connected with the dispositions in favor of *Elizabeth Evans*, and the direction that the half of the property should be divided immediately, or in convenient time after the death of the former, show most clearly the testator's intention, that she should enjoy the use during her life time.

5th. The allowances made by the Orphans court are correct, including those for the support of the negroes. Settlements with that court, after a bill in Chancery against an

executor or administrator for an account, are *prima facie* evidence.

6th. The charges in the bill are not sufficient to warrant the decree. There is no allegation of any waste or consumption of the property by *Ann Soper* as *legatee*, and no relief is prayed against her as such. Relief is prayed against *Evans* alone, as surviving executor, or against him and *Mrs. Soper* as executors; and the accounts with the Orphans court are *prima facie* evidence that the losses were without the default of the executors; and the property consumed was consumed by the negroes and stock whilst in the possession of the executors. 2 *Paige*, 122, 132. 3 *Gill and Johns*. 424.

7th. The circumstance of the legatee for life being the widow of the testator, and as such, to be regarded as a purchaser for a valuable consideration, and not the mere object of testamentary bounty, should induce the court to construe the will favorably towards her. 4 *Harr. and Johns*. 480. 5 *Ib.* 59. 1 *Dessau*. 471, 500. 3 *Ib.* 49.

Alexander, for *Iglehart* and others, claiming as legatees in remainder, insisted—

1. That where a residue of personal estate is bequeathed to one for life, with remainder over, it is a general rule that the estate shall be sold within a convenient time after the death of the testator, and the proceeds thereof invested for the benefit of the legatees, according to their respective interests. And there is no indication in the will of *James P. Soper* of a particular intent that the residue of his personal estate should be enjoyed by his widow and other legatees specifically, so as to exempt this case from the operation of the general rule.

2. That it was the duty of the executors *ex officio* to have converted the estate of their testator; or if they doubted their authority, they ought to have applied to the court of Chancery for directions; and the court of Chancery was bound to administer the estate remaining at the time of the

decree, so as to place all parties interested as nearly as possible in like condition, as if the conversion had been made at the proper moment.

3. That in general, the time appointed by law for passing his first account, is a “convenient time,” within which the executor should be required to convert the estate. In this case the auditor under direction of the Chancellor has assumed that the conversion ought to have been made before the first day of November, 1827, being seventeen months after the probate of the will, and this date was properly assumed under all the circumstances of the case. As consequences necessarily flowing from the foregoing propositions it will be insisted—

4. That the residue is to consist of the original or principal estate with all its profits, increase, and accumulations, as it existed on the first day of November, 1827, or would have existed but for the default of the executors—And the accounts reported by the auditor on the 16th day of February, 1833, will be sustained against all exceptions.

5. And that in addition to the expenses of administration and funeral charges, debts due by the deceased, specific and particular legacies, the executors are entitled to an allowance for all property perished or lost, &c. before the estate could be conveniently converted; and the surviving executor is entitled to allowance “for all sums necessarily expended by him in clothing and maintaining such of the slaves as were not able to work and maintain themselves, and in bringing up, maintaining, and clothing the increase of the slaves so long as they continued a charge.” But no allowance ought to be made for property perished, &c. or claims against the estate which accrued after the convenient time for the conversion. It is the business of the executor to show his right to the allowances claimed by him, and in this respect also the auditor’s accounts before mentioned will be sustained against all exceptions.

Upon the 1st point he referred to 2 *Wms. Exs.* 858. 9 *Preston on Legacies*, 119. 1 *Roper*, 209. 7 *Ves.* 137, 141, and

Evans, *et al.* vs. Iglehart, *et al.*—1834.

note. 9 *Ves.* 549. 3 *Merriv.* 193. 3 *Ves.* 310. 2 *Paige* 124, 132; 2 *Johns. Rep.* 243; 5 *Johns. Ch. Rep.* 346.

Upon the 3d, to the act of 1798, *sub-ch.* 8, *sec.* 14. 7 *Ves.* 94. 6 *Ves.* 520, 535, 539, 542.

Upon the 5th, to 3 *Ves.* 310. 1 *Simon and Stewart*, 189. 3 *Russel*, 301.

DORSEY, J., delivered the opinion of the court.

Although this case may be remanded to the court of Chancery, that the proceedings may be amended, further evidence taken, and proper parties made; yet it is incumbent upon this court to give their views of the various questions which were determined by the Chancellor, have been discussed here, and must arise and control the rights of the parties in the future litigation in which they may be involved.

It has not been made a defence in the answer of the surviving executor, that the whole, or any part of the testator's personal property, had been retained by, or delivered over to the legatee for life; on the contrary, by the whole tenor of his acts and averments, he by necessary implication admits, that the personal estate of the deceased still remains in the hands of the executors, subject to the decree or order of a court of equity. Had it consisted wholly of the specific articles set forth in the inventories, and in the due course of administration been delivered over to the legatee for life, but for the rule of the *English* court of chancery, (of which we shall presently speak,) all liability of the executors, *qua* executors, further to account therefor would have been at an end. The only remedy for the recovery or protection of their rights, which the legatees in remainder could have pursued, would be against the tenant for life, or her representatives, or those into whose hands the property may subsequently have passed.

All the accounts stated by the special auditor having been rejected, and the principles upon which a new audit was to be had, having been prescribed by the Chancellor in his or-

der of the 8th of February, 1833, as these principles will be carried out by him in his ultimate determination of this cause, it is our duty to review them, that they may not form the grounds of a second appeal to this tribunal.

The first instruction given for the auditor's re-statement of the accounts, is, "that from the estate of the late *James P. Soper*, now to be accounted for, the auditor will exclude the carriage and horses given to *Ann Soper*, the slave *Nick*, who was left free, and also all the property belonging to *Soper Hall*, given to *Ann Soper* for life, remainder to *Elizabeth Evans*, which he will consider as consisting only of the slaves, horses, cattle, sheep and hogs, with their increase, and the provisions and provender necessary and proper for their support; and all the plantation utensils, and implements of husbandry; such as ploughs, carts, and the like." As respects the carriage and horses, and negro *Nick*, the propriety of the order has not been, and cannot be controverted. But with regard to the other property enumerated by the Chancellor, if the interpretation given to the order, by the auditor, in his subsequent statements under it, be correct, (and its correctness has been affirmed by the Chancellor in his final decree,) it is obnoxious to many objections, and in some respects works injustice to all the parties in this controversy. It gives to the legatee in remainder, all the property specified which belonged to *Soper Hall* at the testator's death. Whereas by his will, that only was given, which belonged to *Soper Hall* at the death of his wife. There is nothing in the proof in this case, from which it can be ascertained what personal estate belonged to *Soper Hall*, at the testator's death, nor what part of his personal estate belonged to it at the death of his wife, unless the certificate of appraisement of *John Hall*, (of *Jesse*) and *Howard Miller*, was by some agreement of the parties, received as evidence thereof. But even that does not in terms purport to be an inventory of *James P. Soper's* personal property, belonging to *Soper Hall* at the death of the widow, but an inventory of the personal property of *James P.*

Soper, late of *Anne Arundel* county, deceased, as it now (January 31st, 1831,) exists, after the decease of *Ann Soper*, his wife, who had a life estate therein, the same having passed to, and vested in *Elizabeth Evans*, the daughter of *Henry* and *Catharine Evans*, upon the decease of the said *Ann Soper*, in virtue of the said last will and testament of the said *James P. Soper*." Thus, these appraisers, not only undertake to state facts, but to adjudicate important rights, upon a statement of facts wholly insufficient to warrant their conclusions. The order may be unjust also to the legatee over, as being too limited in its enumerations—As for example, it does not embrace the household and kitchen furniture necessary to the comfort and accommodation of the slaves; the plank and other articles upon the farm, brought there for the repair of the buildings; and may exclude many portions of *James P. Soper's* estate, not belonging to *Soper Hall* at the testator's death, but passing under this bequest as belonging thereto, at the death of his widow.

As against the other legatees over, and the appointees by *Ann Soper's* will, it may be equally unjust, by depriving them of property not attached to the farm at the death of the widow, but may have been so at the death of her husband. It does equal injustice to *Ann Soper*, because it changes the property over which a power of testamentary appointment was given to her, and divests her of the increase of the property given to her for life, and of the absolute title to articles whose use is the consumption, and of which the law does permit the limitation over specifically after a bequest for life, even according to the *English* chancery rule before referred to.

The general position is not denied, that a life estate in a chattel may be granted for life to one person, and the same with its issue, or increase be limited over to another; but this cannot be done but by express words, or necessary implication. Here no such express words are used; no such necessary implication arises. The limitation over here is

Evans, *et al.* vs. Iglehart, *et al.*—1834.

“of all the personal property that may belong thereto, at the death of my said wife.” To give it a literal construction, it would pass all the personal property belonging to *Soper Hall* at the widow’s death, no matter who was the proprietor thereof. Such was not the design of the testator. He meant to dispose of what belonged to himself, not what might be subsequently acquired by others. The chancellor’s order refers only to *James P. Soper’s* property as being limited over; thus according to his exposition of the will exempting the effects of the widow from the operation of the bequest. Then, wherefore include the increase, which is as absolutely hers, and no more within the words or spirit of the bequest, than would be a horse purchased by her with the proceeds of *Soper Hall* farm, and used in the cultivation thereof at the time of her death.

The order further states, that “the auditor will allow to the executor, *Joseph Evans*, all sums of money necessarily expended by him in clothing and maintaining such of the slaves named in the inventories, as were not able to work and maintain themselves; and in bringing up, maintaining, and clothing the increase of the slaves, as long as they continued a charge. The residue to be thus ascertained, will be considered as including all articles of which the use was the consumption, the slaves with their increase, and also the use, labor and hire of such of them as may have been hired out, or retained by the executors, with the increase of the other animate personalty; the crops begun by the testator, on the land held by him in his own right, or in right of his wife, such as melons, cantelopes, cabbages, potatoes, clover, hay, wheat, rye, oats, corn and tobacco, which were sown, planted, or gathered during the summer and autumn next after his death, and every kind of personal property with its accumulations, as it actually, or would have existed on the first of November, 1827, but for the negligence, misapplication, or waste, of one or both of the executors of the testator, *James P. Soper.*” Why the auditor was permitted to allow to the executor all sums of mo-

Evans, *et al.* vs. Iglehart, *et al.*—1834.

ney necessarily expended by him in clothing and maintaining the slaves who were unable to work and maintain themselves, but to reject all necessary expenditures for the clothing and maintenance of those able to work, and with whose hire he was to be charged, we are unable to discover any satisfactory reason. Such may have been the situation of the slaves, that clothing was indispensable before they could be hired out, or that they were most profitably hired out, the executor furnishing clothing and maintenance. At all events, it appears a strict rule of equity, which should deny to the executor all allowance for the clothing and maintenance of the negroes, during the time (between six and twelve months) they were employed in finishing and preparing for market the crops on the testator's lands in *Montgomery* county, an operation by which an increase of the assets of the deceased, was alone the object sought to be accomplished. After the first of November, 1827, under this order it would appear that the chancellor regarded the residue of the personal estate, to which the legatee for life, and those in remainder were entitled, as ascertained; and he directs the executor to be charged with interest on the amount thereof from that time, until the 14th of January, 1833, when the negroes belonging to the estate were sold. In January, 1833, the executor is made to account for the residue, not as ascertained in money, in 1827, but specifically, or which is the same thing, the proceeds of sale in 1833, of all that part of the deceased's estate, which appears to have greatly increased in value. To recapitulate then, the executors are compelled to account specifically for the personal estate, from the death of the testator, till November, 1827; from that time, according to a most useful and equitable rule of the court of Chancery, which regards that as done at the time at which it ought to have been done, considering it to have been the duty of the executors, in November, 1827, to have sold, and converted into money, and put out at interest, or invested in proper securities, the entire personal estate, it is assumed that they did so, and they

Evans, *et al.* vs. Iglehart, *et al.*—1834.

are dealt with accordingly; being charged with interest on the balance thus ascertained from that time until the 14th of January, 1833; although for aught that appears, or may be the fact, not one farthing of interest or income was received by them from the property in their hands. On the 14th January, 1833, the slaves having been sold by the surviving executor, for an amount far exceeding their appraised value, the rule before adopted, as far as the negro property is concerned, is from that time abandoned, and he is then made to account specifically, or which is the same thing, for its improved value, as shown by the sales of that day. There is no principle of law or equity, which will warrant a court of justice, (in a case like the present) to regard the same claim, as at one time covering specific property with the profits arising therefrom; then by an equitable fiction, as being converted into money, and bearing interest; and again as attaching on the specific property, whereon it originated. The rights of a claimant must be consistently urged. When in a court of Chancery, a defendant, liable originally for property in kind, is charged with interest on its value, the plaintiff by thus charging him, relinquishes his claim to the property, which vests absolutely in the defendant upon his payment of its value. An election being once made, so to charge the defendant, cannot at a subsequent period be prospectively retracted or abandoned, when the property, still remaining in the possession of the defendant, may have become greatly enhanced in value.

In enumerating the articles that are emblements, and as such form a part of the personal property of the deceased, the chancellor includes "clover" and "hay." In this we cannot agree with him. The crop of hay and clover growing on the real estate of the deceased at the time of his death, passes to his devisee, not to his executors. Neither of those articles, whilst growing, being the offspring of annual labor and cultivation. It is true that in *Wms. Exrs.* 451, it is stated, that "the growing crop of grass, even if sown from

seed, and though ready to be cut for hay cannot be taken for emblements, because as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation. It seems, however, that the artificial grasses, such as clover, saint foin, and the like, by reason of the greater care and labor necessary for their production, are within the rule of emblements." Notwithstanding this authority, we cannot admit that a crop of clover from seed sown in the life-time of the deceased person is emblements. It possesses none of the characteristics of emblements. It is not a crop of annual labor, cultivation or sowing. It is not a grass as is alleged, for the production of which "greater care and labor" are necessary, than for ordinary grasses. On the contrary, much less labor, care and skill are necessary to raise clover than timothy, orchard-grass, or almost any other grass, requires. To sow the seed is the only labor or care which the clover itself demands for its production. It is not sown on land laboriously, or expensively prepared singly for its reception. But is sown early in the spring, in land already sown in rye, oats, wheat, or flax, and no additional labor or cultivation of any kind is used to prepare it for the clover seed. Concede that it is not a perennial grass, neither is it a grass of one year only, nor the subject of cultivation after it is sown. If the executor be entitled to the first crop of hay upon the principles upon which that right is founded, he has the same right to the crop of seed, cut in the ensuing fall, and even to the crop of the succeeding year. Clover seed though sown early in the spring, has no crop mown from it until the June, twelve month, following. Should the deceased die in the April or May succeeding the sowing, would his executors be entitled to the crop, to be cut more than twelve months afterwards? If so, who is to be in possession of the clover land in the interim? who is to enjoy the pasturage for the first summer and fall? If he is not in that case entitled, ought his claim to be allowed where the deceased died in the spring succeeding the sow-

Evans, *et al.* vs. Iglehart, *et al.*—1834.

ing, and has in the interim sown nothing, and bestowed neither labor or expense on the growing crop. It would present the strange anomalous case as to emblements, in which the heir or devisee would take the crop sown, where the decedent died within nine months after the sowing, but had he lived a few months longer, such growing crops would not have enured to the benefit of the heir or devisee, but be assets on the hands of the executor or administrator. In *Maryland* clover has never been held an exception to the rule applicable to other grasses. The growing crop of hay according to all the authorities is not emblements.

Where the chancellor directing that there be included in the residue of the testator's personal estate, (defining by exemplification the subject of emblements) says, "the crops begun by the testator, on lands held by him in his own right, or in right of his wife, such as melons, cantelopes, cabbages, potatoes, clover, hay, wheat, rye, oats, corn, and tobacco, which were sown, planted, or gathered during the summer and autumn next after his death," he is to be understood by the auditor as embracing only such of the enumerated articles, as were planted or sown in the testator's life-time, and were gathered during the summer and autumn next succeeding his death. We do not concur in that part of the Chancellor's order, which makes a part of the residue that passes over to the legatee in remainder, the increase and hire of the slaves, and other animate personality, with the accumulations and income from every other kind of personal property, accruing before the first of November, 1827. This is depriving the legatee of the beneficial interest in the property bequeathed, for five months longer than it appears ever to have been attempted in *England*, where numerous cases are reported. In *Maryland* the question is "*res integra*," being now for the first time, in the course of adjudication in this court. In *England*, as here, it is true as a general rule, that an executor has a right to hold possession, as against legatees and distributees of the

entire personal estate of the deceased for one year. The grounds upon which this rule rests, are correctly given in the following paragraph from 2 *Wms. Ex'rs*, 855. "This allowance however, to executors is merely for convenience, in order that the debts of the testator may be ascertained, and the executor made acquainted with the amount of assets, so as to be able to make a proper distribution. Therefore, if the state of the testator's circumstances be such as to enable the executor to discharge legacies at an earlier period, they have authority to do so"—And for this is cited *Pearson vs. Pearson*, 1 *Sch. and Lef.* 12; and *Garthshore vs. Chalice*, 10 *Ves.* 13. If these be the reasons of the rule, and that they are cannot be denied, it follows as a natural consequence, that the increase and income resulting from personal property specifically bequeathed, where the assets are abundant to pay debts and legacies, enure to the benefit of the specific legatee, and forms no part of the general residue. If it did fall into the residue, then the power conferred to the executor is not merely to pay debts, and execute the provisions of the will, but he has an important *quasi* testamentary power conferred on him, in cases of specific bequests of productive property, at pleasure, to give to or withhold from the specific legatees, an amount equal to from one tenth to one twentieth part of the value of the specific legacies; and by withholding it to confer it on the residuary legatees, or distributee, as the case may be. No such power was designed to be given him by the will; public policy and natural justice forbid its existence by implication.

Great efforts have been made in *England*, to establish a different principle where a residue is given to one for life, with remainder over to another. In that case it has been repeatedly insisted, by counsel, that the increase and income accruing during the first year after the testator's death, from the several species of property, composing the residue, shall not vest absolutely in the legatee for life; but that he shall have the same interest in it that he has in every other part of the residue, and that it passes over in like manner

Evans, et al. vs. Iglehart, et al.—1834.

to the legatee in remainder. We can discover no solid grounds of distinction between the rights of a legatee for life to the increase and profits of a specific legacy, from the testator's death; and the rights of a similar legatee, of a general residue to like interests from the same period. And although *Ld. Eldon* in *Fearns vs. Young*, 9 *Ves.* 549, said "it is not very well settled, whether the tenant for life is entitled to interest from the death, or from a year afterwards;" yet his lordship lived long enough to settle beyond all controversy, that the tenant for life is entitled to the increase and income on the property bequeathed, from the death of the testator, as is fully shown by reference to *Augerstein vs. Martin*, 1 *Turn. and Russ.* 232. *Hewitt vs. Morris*, 1 *Turn. and Russ.* 241. *L. Terriere vs. Bulmer*, 2 *Sim.* 18, and 2 *Wms. Ex'rs.* 857.

The Chancellor does not explicitly declare, that in accordance with the *English* chancery rule upon the subject (as modified by his extension of the twelve to seventeen months,) it is the duty of the executor within the first seventeen months of his administration, to convert all the residue of the personal estate into money, and invest the amount thereof in some secure fund, that the tenant for life might thenceforth receive the dividends or interest thereof, until upon his death the whole might vest absolutely in those entitled in remainder. But from the character of his instructions given to the auditor, we cannot do otherwise than conclude, that in his opinion such were the obligations of the executors. To this doctrine as applicable to *Maryland* we cannot assent.

In *England*, "it is the duty of the executor or administrator, to collect and speedily reduce into money, the personal assets when not otherwise directed." 1 *Chit. Gen. Pra.* 528. Such never was the practice of executors and administrators in this State, and such a course of proceeding is wholly inconsistent with the policy and provisions of our testamentary system, passed in 1798, *ch.* 101, and with all antecedent legislative enactments upon the subject. So

far from its being incumbent upon the executor or administrator to reduce into money the personal assets, to do so, would in most cases be a manifest violation of duty. They are required to divide specifically, or in other words, "in kind," between the legatees and distributees of the deceased, except so far as a sale may have been necessary for the security and benefit of the estate, in respect to the particular property sold, and the payment of debts, legacies, funeral charges, &c. or where they are unable to make a satisfactory distribution amongst the claimants, then, under an order of the Orphans court they are to make sale of so much of the surplus as consists of specifics. The mere fact of giving the personal estate or the residue thereof, to one for life, with remainder over to another, does not of itself destroy the right of the legatee for life, under our testamentary system, to the enjoyment of the property specifically. In *New York*, Chancellor *Walworth*, in *Cowenhover vs. Shuler*, 2 *Paige*, 122, appear to have adopted the *English* chancery rule beyond even its fullest extent; for although one-third of the residue of the testator's personal estate was given absolutely to the widow, and a life estate to her during widowhood in the remaining two-thirds, and in the entire real estate of the deceased; he decreed "that the widow was not entitled to the use or possession of any specific article of the personal estate; but only to one-third of the principal, and the interest or income of two-thirds of the remainder of the general residue, after the debts of the testator and the legacy to *Mrs. Cady* were paid and satisfied. The complainants are therefore entitled to an account of all the personal estate of the testator, in value, as it existed at the death of the father," and that two-thirds of the residue, "must be invested in permanent securities, the interest whereof was to be paid to the widow, during life or widowhood." The executors and legatee for life in the present case, are still more rigorously dealt with. They are not charged only with the appraised value of the personal estate, or in other words, its value at

Evans, *et al.* vs. Iglehart, *et al.*—1834.

the death of the testator, but are charged interest on the appraised value of the negroes, from November, 1827, till January, 1833, when they were sold, and also with their improved value at the death of the widow, all of which improved value is made to enure to the benefit of the legatees over. By which method of liquidating the accounts, the widow is charged with interest for three years on the appraised value of eight negroes, whose ages at the time of her death varied from four to ten years, and who therefore during that time must have been an incumbrance and an expense to her, instead of yielding her any profit on account whereof she should have been subjected to the payment of interest. This appears rather too severe a measure of justice to emanate from a court of equity, and its partial operation and inequality is rendered more apparent by adverting to the fact, that these negroes were appraised at \$690, and sold for \$1,955. This charge of interest was continued against the surviving executor until the year 1833, although it is manifest from the ages of the negroes, that the aggregate value of their services was not more than an equivalent for their support. Suppose that instead of enhancement in the value of negroes, they had all died or runaway, on whom would the loss have fallen? According to the chancery rule in *England* upon the executors. But the case in 2 *Paige*, seems to have been decided simply upon reference to some *English* authorities; the opinion of Chancellor *Kent*, establishing a different doctrine in *Westcoat vs. Cady*, 5 *Johns. Ch. Rep.* 334, being entirely overlooked. There, the bequest was of a residue for life with remainder over, yet the Chancellor determined, that the proper bill for the legatee in remainder to file against the legatee for life, who was also the executrix, was "for the exhibitibn of an inventory." Which determination *ex natura rei*, affirms the right of the tenant for life, to the possession and enjoyment of the residue specifically. The question therefore cannot be regarded as definitively settled in *New York*. In *South Carolina* it would appear,

Evans, *et al.* vs. Iglehart, *et al.*—1834.

that the law of that State is in accordance with the views of Chancellor *Kent*, as in *Johns vs. Johns*, 1 *McCord's Rep.* 132, where a testator owing few or no debts, gave his whole estate to his wife for life; the court say, that the cattle, horses, &c. of the testator, ought to remain on his plantation, and that the wife ought not to have been deprived of the use of them.

Whether the widow of *James P. Soper* ought to enjoy his personal estate specifically, or to receive nothing more than the interest on its value, is purely a question as to the intention of the testator, in conformity to which his will must be executed; there being no unbending principle of law to control such intention, whether it be in the one way or the other. The testamentary law of *Maryland*, then, looking to a distribution of the deceased's personal estate in kind, amongst legatees and distributees, and the practice of executors and administrators having been always conformably thereto, ought we not to presume that the testator had a knowledge of this law, and the usage under it, and that he made his will in reference thereto, contemplating and intending its execution accordingly. The same reasons which prompted the introduction of this Chancery rule in *England*, do not urge its adoption here. We have no *three per cent.* stock in this country as in *England*, in which it is the policy of the government, that all investments by the authority of the Chancery court should be made; nor have we any stock, judicially regarded, of such pre-eminent security, as to be the exclusive object of such investments. The nature of our personal property too, differs materially from that which is the subject of testamentary disposition in *England*. A considerable portion of our personalty consists of slaves, born in our families, humanely treated, faithfully serving us, and warmly attached to their masters and their connexions. To part with such property, even when under the influence of pressing necessity, is a severe trial to the feelings of the master. But voluntarily, and uninfluenced by any such necessity, to subject them by will to

Evans, *et al.* vs. Iglehart, *et al.*—1834.

sale under the hammer, perhaps in foreign bondage, whilst his farms, to which they belonged, were distributed amongst his connexions and relatives, is conduct, the idea of which rarely, if ever, entered into the imagination of a *Maryland* land-holder. We cannot therefore for one moment suppose, that when the testator gave all his real and personal estate to his wife during her life, that contrary to his express words thus used, his intention was not to give her any part of his personal property, but that his executors should sell and invest the same, and pay to her its annual income for life. If such had been the meaning of the testator, he would have used appropriate terms to convey it to his executors. Is it natural to suppose, that it entered into the contemplation of *James P. Soper*, that upon his death, his widow should forthwith abandon his mansion at *Soper Hall*, that his favorite system of improving husbandry should be discontinued; his farms placed in the hands of impoverishing unsparing tenants; all his slaves, not even excepting his own body servant, or the waiting maid of his wife, sold, (and probably in foreign servitude) and that not an article of his personalty, (his carriage and horses excepted,) should be specifically enjoyed by those objects of his bounty and affection, on whom he had so explicitly bestowed it. But the limitation over to *Elizabeth Evans*, of all the personal property that might belong to *Soper Hall* farm at the death of the widow, is conclusive evidence that the testator did not intend, that the general residue should be sold and invested; as in that event, no part of his personal property could by possibility belong to *Soper Hall*, at the death of his wife.

If the surplus or residue thus bequeathed consists of money or property, whose use is the conversion into money, and which it could not for that reason be intended should be specifically enjoyed nor consumed in the use, but be by the executor converted into money for the benefit of the estate; as for example, a quantity of merchandise, a crop of tobacco or the like, an investment thereof must be made by

the executor, in some safe and productive fund, or it must be put out on adequate securities, and most properly under the authority and direction of the Orphans court, or a court of equity ; so as to secure the dividends, interest, or income to the legatee for life, and the principal after his death to the legatee in remainder.

It is conceded in all the authorities which touch upon the subject, that where any article of personalty of such a nature that its use is its consumption, is specifically given to a legatee for life, with remainder over, the legatee for life takes the absolute property in the thing bequeathed. But in *Prest. Leg.* 95, 96, it is stated “that a specific bequest of things which are consumed by their use, vests in their legatees absolutely, though given for life ; if they pass as a residue, then they must be sold, and the produce vested, and the interest paid to the tenant for life.” In 2 *Wms. Exrs.* 858, the same position is asserted, but both these writers, by referring as their authority to *Randall vs. Russell*, 3 *Merriv.* 194, do nothing more than repeat a loose dictum of *Sir Wm. Grantt*, in a case where he made no decision, and where no question arose on a disposition of a residue ; the controversy relating to a specific legacy. And the distinction there suggested, between specific bequests and the bequest of a residue, receives no sanction from the doubt expressed by *Lord Alvanly*, in *Porter vs. Tournay*, 3 *Ves.* 310, adverted to by *Sir Wm. Grantt* ; and in *Rop. Leg.* 209, it is said, that “the point however still suspends in doubt, as at the time when *Lord Alvanly* determined the case of *Porter vs. Tournay*.” But admit the distinction to have been solemnly adjudicated in *England*, (although in point of fact, no such adjudication can be found,) upon what is it founded ? Why, as the aforementioned chancery rule converts the entire residue into money, there is no objection to limiting over such consumable articles ; they are not to be specifically enjoyed or consumed by the legatee for life. The only reason assigned why a specific bequest, of that which is consumed by the use, vests the absolute pro-

Evans, *et al.* vs. Iglehart, *et al.*—1834.

perty in the legatee for life, is, the absurdity of limiting over that to another, which is wholly consumed by the first legatee, and of which therefore, there is nothing left that could be limited over.

But as in *Maryland* the articles composing a general residue are to be specifically enjoyed, the same principle that would vest the absolute property of a specific bequest of consumable articles in the legatee for life, would vest a like estate in a similar legatee in things consumable, part of a general residue. Nay, the reason is stronger in the latter case than in the former, for if the court cannot in the case of such specific bequest, in order to avoid the total rejection of the words of limitation over, infer an intention of the testator, that the thing bequeathed should be sold and invested; *a fortiori*, they cannot infer such intention, when, as regards a bequest of a residue, no part of the limitation over is rejected as wholly inoperative, but its operation embraces all those parts of the residue not consumed in the use.

The Chancellor further orders, that “the auditor will state an account between the surviving executor, *Joseph Evans*, and the defendant, *Charles R. Stewart*, as administrator of the late *Ann Soper*, in which he will award to *Stewart*, as administrator, all the interest on the aggregate value, with which the executor, *Evans*, is hereinbefore directed to be charged, which accrued from the first day of November, 1827, to the third day of October, 1830; and he will charge the administrator, *Stewart*, in favor of the executor, *Evans*, with all such portions of the before described *residuum* of the personal estate of the late *James P. Soper*, and with the increase and accumulations thereof, as came to the hands of the late *Ann Soper*, and were misapplied, consumed, wasted, or not accounted for by her.” The error in the time, and mode in which this aggregate is to be found, and the time from which the income or profits of the residue are to be credited to *Mrs. Soper*, have been before pointed out; but we have not expressed any opinion,

as to the nature or extent of the liability of *Charles R. Stewart*, the administrator of *Ann Soper*. We cannot concur with the Chancellor, that upon the record now before us, he is answerable for any portion of the *residuum* of the personal estate of *James P. Soper*, that came to the hands of *Ann Soper*, and was misapplied, consumed, wasted, or not accounted for by her, except by way of set-off, or discount from his claim against the surviving executor; the bill having not only failed to charge the fact of assets, but the proof in the cause furnishing no ground for the presumption, that *Ann Soper* left any personal estate, or if she did, that any part of it ever came to the hands of her administrator.

The rule upon this subject is different in a court of equity, from what it is at law. Where you seek to charge an executor or administrator, in his representative character, before the latter tribunal assets are presumed, unless as a fact it be put in issue by the pleadings; but before the former tribunal, assets in his hands must be alleged, and if denied or not admitted, must be proved. True it is, that by the act passed at December session, 1832, *ch.* 302, this court is prohibited from reversing or affirming any decree of a court of equity, on the ground that the complainant has not in his bill, by proper averments, shewn himself entitled to the relief which has been granted, unless such defect was presented by an exception to the consideration of the court below; but the legislature have not as yet gone the length of enacting, that the Court of Appeals must affirm a decree appealing from, where it neither appears on the face of the bill, nor the proofs in the cause, that the complainant is entitled to the relief which has been extended to him. Such is the predicament of the present complainants.

Of the Chancellor's direction to the auditor, "to allow to *Joseph Evans*, as executor, a commission of five per cent. on the sales made under the order of the 12th of December last," we cannot approve. The sale was made by him as

Evans, *et al.* vs. Iglehart, *et al.*—1834.

executor, and it was his duty to have made it, upon his being unable otherwise to make a satisfactory distribution amongst the parties entitled; which, from the nature of the property to have been divided, and the number of claimants in this case, could not possibly have been effected, but by a sale. The whole course of his proceedings shows, that he claimed to hold the property sold, as executor, and consequently had not discharged himself from further accountability therefor, by assenting to its being passed over to *Ann Soper*, the legatee for life. The will limits the commission to the two executors to five per cent.; he alone has received the whole amount, and there is nothing to induce us to believe, that the insufficiency of the compensation is so great, as to justify us in increasing it even if the executor had diligently and faithfully discharged the duties of his appointment. But such is not the attitude in which he stands before the court. He has not settled up the estate in due time; delivered the portion of the residue which was in specifics to the widow, and taken from her the proper inventory therefor, nor has he invested or placed out on proper securities, such part of the residue as should have been money in his hands. He is to be regarded therefore as a delinquent, not a meritorious executor, who having promptly and faithfully discharged his duties, asks an increase of his compensation. He should have been allowed a commission of five per cent. on the excess of the sales, over the appraisement, and a similar commission on all those parts of the personal estate, whereon no allowance had heretofore been made to him.

We dissent from the instruction given too, by the Chancellor to the auditor, to exclude in his statements the executor's third and fourth accounts passed before the Orphans court; this court having decided in the case of *Contee vs. Dawson*, that similar accounts, (that is, accounts passed by an executor before the Orphans court, pending a controversy in the court of Chancery, between the executors and a claimant,) were admissible in testimony before the auditor.

They are mere *ex parte* proceedings; only *prima facie* evidence, and perhaps ought to be subjected to a somewhat more suspicious and rigorous scrutiny, than if passed by the Orphans court before the commencement of the litigation in the court of Chancery.

There are other objections to the auditor's statements, made under the Chancellor's order of the 8th February, 1833, besides those resulting from the errors in the order itself, and which have been suggested in its examination. The executor is debited with the sum of \$63 83, as gain on sales of parcel of the estate made April 14th, 1831; and how has this gain been ascertained? In the usual mode, by deducting the appraised value of the property sold, as shown by the original inventory, from the amount of sales? No. But by deducting from the produce of the sales the value of the articles sold, as it appears upon an unauthorised appraisal procured by *Evans* in 1831, after *Ann Soper's* death, and to which her administrator is in no wise connected as a party. If the auditor assumes this as the standard of the value of the several articles contained in it, where-with the executor is chargeable, common justice requires, that to make him accountable according to that standard, you must debit or credit him, as the case may be, with the difference between that and the original appraisalment. If this be not done, gross injustice is the inevitable consequence, and either the deceased executor of *James P. Soper*, or his legatees, must be injured to the precise amount of the difference between the two appraisalments of the articles sold. As for example; suppose the value of the property sold per the first appraisalment is \$1000, by the second \$500, and by the sales \$1000; according to the auditor's mode of stating the account, as adopted in the present instance, the executors are to remain charged with the original appraisalment of \$1000, and to be charged with the additional sum of \$500, the difference between the produce of the sales and the second appraisalment, when in truth there was not one farthing gain or loss by the sales.

So, on the other hand, if the rule is intended to work both ways, should the first appraisement be \$500, the second \$1000, and the amount of sales \$500, the executor must be credited with a loss on the sales of \$500, when in fact the amount of sales, and the appraised value wherewith the executors have been charged are identical, and consequently no allowance whatever should have been made in either case. But the injustice and inaccuracy may perhaps be rendered more apparent, by tracing its effects upon the executors in a single article sold. A gig and harness in the original inventory is valued at \$200, in the second at \$90, and was per account of sales sold at \$91 50. The executors stand charged in the auditor's accounts with the \$200, the original appraised value, and are also charged \$1 50, as gain on the sales, when in truth, their actual loss on the sale, as is self evident, was \$108 50, with which they ought to have been credited. This mode of stating the accounts does no injury to the surviving executor, on the contrary he is a gainer by it, to the extent of his commission on the sum thus erroneously charged, and on the amount for which a credit ought to have been allowed. Upon the widow falls the entire loss. *Evans* is debited with the \$1 50, which he has received, whilst the widow's administrator is charged with the \$200, the appraised value, when in justice she ought to have been credited with \$108 50, the loss actually sustained. Whether a proportionate loss has been incurred on all the other articles sold in April, 1831, and of consequence the widow's administrator, by the auditor's statement, stands burthened therewith, we have not deemed it necessary to inquire. We simply selected, to illustrate the error of the accounts, the article which by the report of the sales appeared to have been sold for the highest price. The inconsistency of the auditor's statements is most manifest from his own accounts, for in the very next item in his account, in ascertaining the gain from the sales of the negroes and some other property, he deducted from the amount of sales, the appraised value

from the original inventory, and charged the gain on the sales accordingly ; thus repudiating the principle on which he had made the preceding entry.

The auditor, though acting under the Chancellor's order of the 8th of February, 1833, has not in all things conformed to it, and in one instance of his departure therefrom, has erred in a most important particular. Instead of doing as the Chancellor had properly directed him, to wit, "distribute the balance among those entitled under the will of the late *James P. Soper*," he has in effect made one moiety of the amount thereof payable to *Charles R. Stewart*, administrator of *Ann Soper*, who has no pretence of right to receive any portion of it. *Ann Soper* had no interest or title to the property, except during her life-time, and consequently, nothing which could devolve on her personal representative. Upon her death one half of the balance vested in the appointees named in her will, and the other moiety in the legatees in remainder, designated in the will of *James P. Soper*. The auditor could not have supposed that any part of it was assets in the hands of her administrator, or that, as such, he could have claimed a commission thereon. If so, the amount to be received by the appointees of *Ann Soper*, would be less than that received by the legatees in remainder, contrary to the express provision of the will of the testator. Then why pay it into the hands of *Ann Soper's* administrator? A mere power of testamentary appointment, such as that wherewith *Ann Soper* was clothed, vests in her no right to the property over which it is to be exercised, that could possibly pass to her administrator. His claim to the whole balance is quite as well founded as that to one half.

Looking to the situation of the negro property, and the proof and admission in relation to the account of *Elizabeth Evans*, against the surviving executor of *James P. Soper*, we see no sufficient reason for its rejection.

We cannot concede to *Ann Soper* the unqualified right which has been asserted in her behalf, to all the interest

Evans, *et al.* vs. Iglehart, *et al.*—1834.

which accrued after the death of the testator, whether resulting from debts due to him in his life-time, or due to his executors or executor, for property by them sold. So much thereof as was necessary for the purpose, must be first applied to the extinguishment of interest which accrued on the debts of the testator since his death, the balance thereof vests absolutely in the widow, as legatee for life.

The Chancellor's decree is erroneous in another respect. It is not a final adjudication upon the whole subject matter. The entire fund is brought before the court for distribution, under the wills of *James P. Soper*, and *Ann Soper*. In the opinion of the Chancellor all the necessary parties are introduced. Suppose then, (but for what reason we are unable to comprehend,) it was necessary for the one moiety of the balance, in its transit to the appointees named in *Ann Soper's* will, to pass through the hands of *Charles R. Stewart*, her administrator; ought it to have been permitted to rest there, to form the subject of a new Chancery suit, between the appointees and the administrator? The decree should have gone further, and ordered its payment over by the administrator to the appointees.

The final decree of the Chancellor, overruling all exceptions to the auditor's report, ratifying and confirming the same, and ordering a distribution accordingly, would be reversed; but as was intimated in the commencement of this opinion, this cause must be sent back to the Chancery court, from the want of proper parties: all persons interested in the subject matter not being before the court, we are unable to make that full and final determination on the subjects in controversy, which the nature of the case demands at the hands of a court of equity. All the appointees named in the will of *Ann Soper*, to whom any portion of the moiety of *James P. Soper's* personal estate, over which she had a power of testamentary disposition, was given, must be made parties in this suit, before any decree can be pronounced, by which their rights would be concluded.

This court therefore, agreeably to the provisions of the

The State of Maryland vs. The Bank of Maryland.—1834.

act of Assembly, passed at December session, 1818, *ch.* 193, in order that *Ann Stewart, Catharine Stewart, Achsah Evans, Harriet Evans, Catharine Evans* and *Mary Evans* of *Anne Arundel* county, may be made parties in this cause, do award a writ of *procedendo* for a return of the same to the Chancery court, and that a new trial thereof may be had. And in pursuance of the provisions of the act of Assembly, passed at December session, 1832, *ch.* 302, it further appearing to this court, after hearing and considering the appeal made from the decree in the court of Chancery, that the substantial merits of the cause will not be determined by reversing or affirming the said decree, and that the purposes of justice will be advanced, by permitting further proceedings in the cause, by the amendment of the pleadings, and the introduction of further testimony, do hereby order this cause to be remanded to the court of Chancery, for that purpose; and that it may be there tried upon its merits, and in conformity with the views expressed by this court, in the foregoing opinion.

PROCEEDINGS REMANDED TO THE COURT OF CHANCERY.

THE STATE OF MARYLAND vs. THE PRESIDENT AND DIRECTORS OF THE BANK OF MARYLAND, AND ELLICOTT, MORRIS, AND GILL, TRUSTEES.

A debtor in failing circumstances may prefer one creditor to another by a transfer of his property made in *good faith*; nor is there any objection under similar circumstances to the validity of a transfer by a debtor of his whole estate to trustees for the equal benefit of all his creditors.

The principle is the same whether the deed of transfer is made by a corporation or an individual.

A *bona fide* assignment of property by an insolvent individual to a trustee for the benefit of his fair creditors, is a valid sale and transfer of the property for a valuable consideration; a like transaction by an insolvent corporation in relation to the property subject to its debts, is equally a good sale and transfer of it.

The State of Maryland vs. The Bank of Maryland.—1834.

A corporation not being a person capable of taking the benefit of the insolvent laws of this State, is not affected by the act of 1812, *ch. 77, sec. 1*; and 1816, *ch. 221, sec. 6*.

The rights conferred by the act of 1650, *ch. 28*, were granted to the lord proprietary of *Maryland*, personally, and to his heirs, so long only as they should be lords proprietaries of the then province; that act was not in force at the period of the revolution, and the privileges which it originally created did not pass to the State.

The royal prerogative right of preference in the payment of debts is a branch of the common law of *England*, and that common law has been adopted in this State by the general terms of the declaration of rights, and the third article thereof. And this secures to the State the right at common law to have its debt first paid out of the property of its debtor, *remaining in his hands, and no lien standing in the way*.

The right of priority of the State is a rule *only* in the distribution of the property of the debtor, requiring the debt due to the State to be first paid, where the individual creditor has no antecedent lien overreaching it.

The State of *Maryland's* funds were deposited in a bank under resolution of the General Assembly, and the bank being in failing circumstances, the president and directors thereof transferred all its property to trustees for the equal benefit of all its creditors. **HELD**, that the assignment was valid, and that the preference which the State had in the payment of her claim so long as the title to the property remained in the bank was defeated by the deed of trust.

An executor or administrator takes the funds of the deceased to be distributed according to law, subject to such preference as the law allows. The moment the debtor dies the law asserts the rights of the creditors, and takes the property into its hands, and makes or directs the distribution of it according to their priority; that being the law of deceased person's estates which a testator cannot by his will defeat.

A banking corporation although it may by a transfer of all its property render itself powerless to discharge the ordinary purposes of its institution, yet still remains a living and existing corporation.

APPEAL from the equity side of *Baltimore* county court.

On the 3d of October, 1834, the *State of Maryland* filed a bill on the equity side of *Baltimore* county court, against the appellees, *the President and Directors of the Bank of Maryland*, and *Thomas Ellicott, John B. Morris, and Richard W. Gill*, trustees; claiming to be paid out of certain funds in the hands of the trustees, in preference to the other creditors of the bank, which was charged and admitted to be insolvent.

The bill alleged, that the *Treasurer of the Western Shore* on the 1st of October, 1832, in pursuance of a resolution of the *General Assembly*, passed on the 14th of March, 1828, deposited of the public monies, in the *Bank of Maryland*, the sum of \$50,089 96, for which, with interest at the rate of *five per cent. per annum*, the interest payable quarterly, and the principal on demand, he received a certificate of deposit signed by the president and cashier thereof. That afterwards, on the 22d of March, 1834, the said bank became insolvent and unable to pay its debts, and being so insolvent, on the day after (the twenty-third of March) conveyed and transferred to *Thomas Ellicott*, all its estate, property, funds, rights and credits. That on the 26th of March of the same year, the said bank executed a similar deed to the said *Ellicott*; and afterwards on the 5th of April of the same year, the *Bank*, and *Ellicott*, conveyed and transferred to *Ellicott, Morris, and Gill*, all the said property, funds, rights, and credits. That they accepted the trust, and in virtue thereof, have received large sums of money, which they now hold for equal distribution among the creditors, alleging that the *State* is only entitled to be paid *pari passu* with the rest.

The deeds which are exhibited with the bill, direct the trustees to divide the property and funds of the bank, when realised, among all its creditors equally and rateably.

After the trustees had answered, admitting the facts stated in the bill, it was agreed, that the question to be decided, was, whether the *State* has any, and what preference, under the circumstances of the cause, over the other creditors. If it be decided, the *State* has no preference, the bill to be dismissed. If she has a preference, then the case shall be remanded to *Baltimore* county court, and before final decree, the auditor shall ascertain the amount of funds in the hands of the trustees, clear of expenses, and such allowances as they may be equitably entitled to, upon which ascertainment such further proceedings shall be had, as are usual in such cases. And it was further agreed, that *Baltimore*

county court should pass a *pro forma* decree dismissing the bill.

Such a decree was accordingly passed, and the record upon the appeal of the *State*, brought before this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, DORSEY, and CHAMBERS, J's.

Taney, Dixon, and Price, for the *State* contended,

1. The right asserted on the part of the *State*, is not a lien, or charge on the person or property of the debtor; but a right founded upon the common law to a priority of payment, whenever its rights, and the rights of the citizens came in conflict, and when as between individual creditors, there would be a *pari passu* abatement. The right is a personal privilege, attached to the person of the sovereign, and comes into existence when his right, and the rights of private persons are brought into collision. 5 *Cranch*. 299. 1 *Black. Com.* 178, 185. 3 *Bac. Abr.* 79. 5 *Ib.* 487, 558. *Tidd's Pr.* 1099. This privilege forms no part of the contract with the debtor, and does not embarrass him. He may notwithstanding the privilege, alien or encumber his estate, and use it in any way, which his convenience, or interest may dictate. It merely regulates and affects the comparative personal rights of creditors, when in other respects they stand in *equali jure*. As regards the debtor, the *State* is but an ordinary creditor. She only stands upon higher ground in reference to other creditors, whose claims are in equal degree. The right does not depend upon process, or the action of the *State*. Whenever conflict arises, whether by process, the death, or the act of the party, not having enough to pay his debts, the right attaches, as a sovereign prerogative right; and this right has been expressly conferred upon the *United States* by statute, and neither its constitutionality or policy have ever been questioned. On the contrary it has been deemed a wholesome right, and as such received the sanction and approbation of the courts. 6 *Binney*, 271. 2 *Cranch*, 389, 390. 6 *Peters*, 30, 35.

The claim to a priority in payment in *England*, on the part of the king, is founded upon *magna charta* itself, which was written by the property holders of the kingdom, and signed by a conquered king, not for his private benefit, but for the public good. The right is a vested one, and the deed, so far as it proposes to divest it, and place the claim of the *State* on a level with the other creditors is, inoperative. The right being based upon the common law, is adopted by the third article of the declaration of rights, which introduces into the jurisprudence of *Maryland* the whole body of the common law, not inconsistent with the frame of the new government, and subject of course to legislative modification. 5 *Harr. and Johns.* 401. 3 *Harr. and McHen.* 173. The act of 1650, *ch. 23*, shows that this common law principle was recognized and adopted by the colonial legislature. There can be no distinction between this case, and the case of a deceased debtor, whose property is in the hands of his executor or administrator, where according to repeated adjudications, a priority is enjoyed by the *State*.

There is no *English* statute now in force, which gives the king a preference in the case of deceased debtors. It is derived therefore from the common law, which is not limited to that particular case.

The deed in this case cannot be supported if it interferes with the vested rights of the parties. For all substantial purposes, the corporation is dead, and this court will administer its assets, as if such was the case. The deed amounts to a surrender of the charter. 8 *Cowen*, 387. 2 *Kent's Com.* 251. 19 *Johns. Rep.* 456. 7 *Johns. Ch. Rep.* 225. *Angel and Aimes on Cor.* 509. It is the case then of a dissolved corporation, not only without means to pay its debts, but without the capacity of acquiring them, and a court of Chancery, regarding substance, and negligent of forms, must so treat it.

The deed brings the *State* and the other creditors directly in conflict, as they all, and each, seek to be paid out of

the funds covered by it; and they being inadequate to the full payment of all, opposing rights are unavoidably created. Unless the right of priority exists in such a case, it is a mere shadow, capable at all times of being defeated by the mere voluntary act of the debtor. It is not said that property *bona fide* sold and conveyed for the payment of a just debt, is subject to the claim now set up on the part of the *State*. But the question here is, does not the right attach, when the sole object of the deed, is to provide for the payment of debts generally.

As a general proposition, the right of the *State* to a priority in the payment of its debts, cannot be denied. 3 *Harr. and McHen.* 173. 1 *Harr. and Johns.* 417. *Kilty's Rep.* 206. The act of 1650, *ch.* 28, which gives it, was declared by *Bacon* to be in force in 1763. By the act of 1676, *ch.* 2, it was confirmed among the perpetual laws. *Kilty's Rep.* 206.

The third article of the declaration of rights refers to the common law, as known in *England*, and not merely to those portions of it which had been used and recognized in the colonies anterior to the revolution. 5 *Harr. and Johns.* 401.

No inference can be drawn adverse to the existence of this common law doctrine of priority, from the passage of the act of 1650, *ch.* 28. The preface to *Bacon's* compilation of the laws shows that it grew out of previous political dissensions; and the same remark may be made in reference to the act of 1650, *ch.* 23.

The argument that if the right exists as in *England*, that then the *English* remedies must also obtain here, such as the writ of protection, &c. is not sound. Though we may adopt the rule, we are not bound to adopt the remedies; but may fashion them according to the nature of our institutions, and the spirit of our government. The principles of jurisprudence are one thing, and the machinery by which they are carried into operation another, and very different thing. We may adopt the one and wholly reject the other. *Kilty's Rep.* 224, 225, 227, 233.

The case in 3 *Harr. and McHen.* shows that the *process* used in *England* is not necessary here; for in that case the court took judicial notice of the right of the State, without an *extent*, or any proceeding whatever on its part.

The deeds in the present case are purely voluntary—no consideration passed from the grantee to the grantor, nor was their execution induced by the solicitation of the creditors, or any of them. Reference has been had to the case of *Brooks vs. Marbury*, 7 *Wheat.* 576. But in that case *Marbury*, the grantee, was a stockholder in the *Bank*, whose claim was provided for; and besides, the contest there was between individuals, and involved no question touching the prerogative of priority. The extent in *chief* is a process used by the king for the recovery of his own debt. That in *aid* by the king's debtors against his own debtor; and the process in the latter case confers upon the party adopting it, no new right. The case in 3 *Price* was a case of this latter description, and consequently was merely a case between individuals. And the case in *Clarke and Finley*, 91, only decides, that when the *King* sues out an extent in aid he is only clothed with the rights of his own debtor, when he thinks proper to resort to this remedy. All the cases cited on the other side on this branch of the subject, refer to the case in *Price*, and concur in deciding, that the relative rights of the *King's* debtor, and such debtor's debtor are not changed by the recourse to the extent in aid; and that when the *King* himself resorts to the same process, he stands in the predicament of his own debtor, and has no higher rights.

Though an assignment in bankruptcy, in reference to individual creditors, relates back to the act of bankruptcy, an extent at the suit of the *King* issued in the intervening period between the act and the assignment, will be effectual, and overreach the assignment. The reason why the king is bound by an actual assignment is, that it is a judicial proceeding, a judgment in bankruptcy.

It has never yet been decided that the State is within the insolvent laws. They form of themselves a peculiar system inapplicable in many of their principles and details to the State; which is never included in a law unless expressly named in it, or by necessary implication brought within its provisions. If, however, the *State* could be regarded as within the insolvent laws, with respect to individuals, she cannot be so considered, in relation to a corporation which itself cannot be within those laws, being incapable of imprisonment, or availing itself of the benefit of its provisions.

Johnson and McMahon, for the appellees.

The claim of the *State* is founded upon a mere simple contract, not prosecuted against the debtor himself, but the creditors of such debtor, claiming as *bona fide* alienees without notice, and against the very terms of the deed. No priority will be given under such circumstances, unless it arises from some superior equity, or from a lien upon the fund, which follows it as a trust in the hands of the alienee. As against a person employed by the public in the collection of its revenue, there might be some policy and justice in giving the preference claimed here; for in such a case the officer would be known to act in that capacity, and to be a mere custodiary of the public moneys. But in this case the *State* voluntarily, and for the purpose of profit, parted with its money, trusting wholly to the personal responsibility of the debtor, and thus placed herself on a common level with all other creditors. In taking these deposits on interest, the bank in effect increased its capital, and necessarily expanded its circulation. The *State* must have known such to be the design of the bank, as otherwise how could it afford to pay interest on the deposit. She furnished the bank then with the means of enlarging its business, and increasing the amount of its responsibilities; and after doing this, if she is permitted to engross the whole fund to satisfy her claim, or take more than her due proportion, she will be allowed to perpetrate a fraud upon the other creditors. It

has been said, that the deposit was made under the authority of a resolution of the legislature, of which all persons are bound to take notice. But the resolution does not designate the bank in which the deposit was to be made; and besides, with regard to *prior* creditors, against whom also the preference is claimed, there could have been no notice either in law or in fact. If a preference is awarded the *State* in this case, she will be equally entitled to be preferred in every case in which she is a joint stockholder in the bank, or any other company, after the payment of the debts of such bank or company. No distinction can be taken between joint depositors and joint stockholders. If prerogative prevails in the one case it will in the other; and the same will be the case, whenever a *State's* debtor, being insolvent, shall undertake to alien his property, though the alienee may be alike ignorant of his indebtedness or insolvency. Such secret trusts or liens have always been discountenanced by the courts.

The right now claimed on the part of the *State* must be either inherent or derivative. It cannot be inherent and original, as a sovereign right, for as such it is forbidden by the genius of our government, all of whose powers are derived from the constitution or laws. None of the departments of the government, nor the whole combined, possess any of that class of powers which emanate from the prerogative.

The rights of the *State*, under the constitution, reside in the legislature, and until they are called into action by that branch, the organ of the sovereign will, no other department can exercise them. But suppose such a right to exist in ordinary case, would it be applied to one like the present, in which the *State* became a creditor, by depositing her money for hire. By so doing she placed herself on a common platform with all the other depositors, and must share one common fate with them. 9 *Wheat.* 904. 3 *McCord.* 377. Not a case can be found in the *United States*, in which a priority of payment has been successfully asserted

The State of Maryland vs. The Bank of Maryland.—1834.

upon the ground of prerogative. 1 *Dessau*. 450. *Appendix*, 599. The priority in favor of the *United States* is founded upon statute. *Act 3d March, 1798. 2d March, 1799. 4 Wheat.* 118, (*note.*) 2 *Cranch*. 391. 6 *Peters*, 30, 35.

2. Nor is it derivative from the king or proprietary.

At the common law, the mere indebtedness of a party did not give the king a lien on his goods and chattels, nor did the commencement of a suit, nor the mere rendition of a judgment. There must be an execution, and a previous alienation of goods and chattels by the king's debtor would be good against him. 16 *East*. 280. *Coke Lit.* 131, (B.) *Stat.* 23d, *Ed.* 3, *ch.* 19. 33 *Henry*, 8 *ch.* 39. 1 *Clarke and Finley*, 120. If the property of the king's debtor is altered, the right of the king is gone. 5 *Serg. and Low*, 122. 1 *Clarke and Finley*, 72. 2 *Wm. Black. Rep.* 1251. 4 *Durnf. and East*. 402. If the king's debtor mortgages, or pawns his goods for money, it is good against the king. 6 *Price*, 369. As is likewise an assignment in trust like the present, for the general benefit of creditors. 3 *Price*, 6. *Chitty's Prerogative*, 285. 9 *Peters*, 326. 2 *Tidd*. 1038. When this deed was executed the *Bank* was in possession of all her chartered rights, and of course had power to contract and pay debts. In *England*, at the common law, the king, though the *Bank* was perfectly solvent, might have issued the writ of protection, and thus prevented her from paying any debt before his own was satisfied.

The statute of *Henry VIII.* places the crown and an individual creditor on an equality before suit brought; and therefore, unless the *State* has rights superior to the *King*, since the statute, she cannot be entitled to a preference. These statutes were intended to soften the rigor of the common law in this respect, and yet are declared by *Kilty's* report not to be in force here; the inference from which is, that the doctrine itself to which they relate is not in force. If the doctrine is in force here unmitigated by the statutes,

then we have it, as at common law, with the writ of protection, and all its other incidents. 2 *Cranch*, 402.

The declaration of rights, only incorporated into our laws the common and statute of laws of *England*, as they existed at the *time* the declaration was made. Though adopted in mass, the principles of the common law, are qualified by the nature of our institutions. It was adopted for the regulation of the rights of citizens *inter se*, and not as applicable to the government, or to confer political power upon it. That declaration was not designed to arm the government against the citizen, but to protect the citizen from the government. Nor can the right be deduced from the act of 1650, *ch.* 28. That act was for the benefit of the lord proprietary, as the executive head of the State, so long, and so long only, as he filled that situation. And that law was not in force at the time of the revolution. Act of 1676; 1692, *ch.* 84; 1704, *ch.* 77.

But suppose the right to exist, it is a mere priority, and not a lien attaching itself to the fund, and may be defeated by a *bona fide* conveyance. 4 *Wheat.* 108. 2 *Cranch*, 390. 3 *Ib.* 89. 2 *Wheat.* 435. 1 *Peters*, 438. 4 *Peters*, 36. 2 *Tidd.* 798 to 1000.

The deed is good and effectual for the purpose for which it was executed, though the trustees were not themselves creditors, and though the creditors did not solicit its execution. *Brooks vs. Marbury*, 7 *Wheat.* 578. 11 *Wheat.* 78, 98. 3 *Maule and Selw.* 371.

There is no conflict or concurrence of title in this case; each creditor is entitled to his rateable proportion; just as though the proportion due each had been parcelled out and assigned to him separately.

The case of the *State vs. Walsh*, 2 *Gill and Johns.* 406, decides, that the State was within the insolvent laws.

By the act of 1807, *ch.* 77, a party who makes a preference forfeits the benefit of the insolvent laws; and yet the State, who has been decided to be within those laws, asks a court of equity to adjudge a preference in her favor. The

The State of Maryland vs. The Bank of Maryland.—1834.

court is asked to do that, which if done by the party, would be punished as an illegal act. And as by the act of 1812, the preference itself is void, the State is, if her claim is successful, in a better condition than if the *Bank* itself had attempted to prefer her by deed. 2 *Kent's Com.* 420. *Catlin vs. Bank*, 6 *Con. Rep.* 233. The execution of the deed did not operate a dissolution of the corporation. 2 *Kent's Com.* 250. 19 *Johns.* 456. 4 *Gill and Johns.* 107. 7 *Johns. Ch. Rep.* 226. *Act of 1818, ch. 177.* 1 *Hopkins' Ch. Rep.* 303. 8 *Cowen*, 387, 395.

BUCHANAN, Ch. J., delivered the opinion of the court.

Before the institution of this suit, there were deeds of trust executed by the *President and Directors of the Bank of Maryland* to *Thomas Ellicott*, on the 23d of March, 1834, and the 26th of March, of the same year; and by the *President and Directors of the Bank of Maryland*, and *Thomas Ellicott*, on the 5th of April following, to *Thomas Ellicott, John B. Morris* and *Richard W. Gill*, of all the estate, property, funds, rights and credits of the bank, wherever situated, in trust, to divide the same whenever realized and collected, among *all* the creditors of the bank *equally* and *rateably*.

The object of the bill is not to set aside the deeds, or either of them, but to subject the property and funds covered by them, in the hands of *Ellicott, Morris* and *Gill*, as trustees, calling, and treating them as such throughout, to the payment of the entire debt due from the bank to the *State*, in preference to the other creditors, and to their exclusion.

The prayer of the bill is, that the *President and Directors of the Bank of Maryland*, and the trustees, *Ellicott, Morris* and *Gill*, shall be compelled by decree to pay the amount of the *State's* claim, \$50,089 96, with interest at the rate of 5 *per centum*, out of the funds in the hands and possession of the *trustees*; and the ground taken in argument is, that the *trustees* took, and hold the fund under

their deed, subject to the preference claimed by the *State*, not as against, but under that deed; the question as to the validity of it not being considered open for discussion, the then members of this court having heretofore determined, on the application of the *Union Bank of Tennessee*, for an injunction against the *Trustees of the Bank of Maryland*, that it was a good and valid deed, and we have perceived no reason for changing that opinion. It has been more than once decided by this court, that a debtor in failing circumstances may prefer one creditor to another, by a transfer of his property made in good faith. And if, according to circumstances, one creditor may be preferred to another, it would be difficult to imagine an objection to the validity of a transfer by a debtor of his whole estate, to trustees, for the equal benefit of all his creditors. Equality is equity, and when a debtor makes a transfer of his property for the fair purpose of equal distribution among his creditors, he does an honest act, and discharges a moral duty, which none can reasonably complain of; and to which objection can seldom be made, except by such, as may seek to secure their own claims at the expense of the other creditors. In such case, it would not be the debtor seeking to evade or defeat the rights of the creditors, whose interests, according to the extent and character of their respective claims he proposes to protect, but the particular opposing creditors, seeking to draw to themselves more than their just proportions of the debtor's effects, to the prejudice of the other creditors. So that if there be any thing unfair, it would seem to be chargeable, not to the debtor in attempting to secure an equal and just distribution among his creditors, but rather to the creditor attempting to prevent such equal distribution, and to secure his own claim to the exclusion of the other creditors. For it is only with the view and expectation of securing his own debt, or advancing his interest beyond that of the other creditors, and not to procure a just and equal distribution of the debtor's property, that a creditor will seek to set aside such a deed; since the deed

The State of Maryland vs. The Bank of Maryland.—1834.

itself if suffered to stand unimpeached secures that object.

Looking beyond the decisions of this court, before adverted to, which were founded upon the insolvent and other existing laws of the *State*, and which it is not thought necessary to examine in this place, it will be seen, that the same subject has been investigated, and the same principle maintained elsewhere. *Pickstock vs. System, 3 Maule. and Selw. 372*, is a case in which a debtor in insolvent circumstances being sued by *Pickstock*, one of his creditors, he suffered a judgment by default, and after a writ of inquiry executed, made an assignment by deed of *all* his effects to trustees, for the benefit of *all* his creditors, embracing of course the plaintiff in the judgment: after which a *fi fa.* was delivered to the sheriff, who levied under the *fi fa.* and *Pickstock*, the judgment creditor, brought suit against the sheriff to try the validity of the assignment, and whether the property passed under it from the debtor to the trustees; and it was held, that the assignment was not fraudulent under the *Statute 13 Eliz.* but passed the property, although made with intent to delay and defeat the particular creditor, by depriving him of the benefit of his execution, who would thereby have gained an advantage over the other creditors, on the ground, that notwithstanding such was the intention and effect of the assignment, yet that it was for the benefit of all the creditors, of whom he was one, and was placed by the assignment in the same situation with the rest of the creditors, who had an equal right to a fair distribution.

In *Hendricks vs. Robinson, 2 Johns. Ch. Rep. 289*, an assignment by a debtor in insolvent circumstances, being *bona fide* to secure a particular creditor, was held to be good, and to pass the property, on the ground that "the object of the statute of frauds, was to prevent deeds, &c. fraudulent in their inception and intention, and not merely such as in their effect might delay or hinder other creditors." So, in *Halliard vs. Anderson, 5 Term. Rep. 233*. *Estwick vs. Caillard, 5 Term. Rep. 420*. *The King in aid of Braddock vs. Watson and another, 3 Price Rep. 6*. In

this last case the assignment was of all the property of an insolvent debtor, for the benefit of all his creditors, as here; and it was held to be good and valid to pass the property out of the insolvent debtor to the trustees, notwithstanding he was a trader, no commission of bankrupt having been sued out.

Marbury vs. Brooks, and Brooks vs. Marbury, was a case of attachment sued out by *Brooks*, a creditor, against the lands, tenements, goods, chattels and *credits*, of *Fitzhugh*, an absconding debtor, and laid in the hands of *Marbury*, who claimed and held the property, &c. under a deed of assignment to him by *Fitzhugh*, of all his estate, executed before the attachment was issued, for the particular benefit of certain preferred creditors, several of the banks in the *District of Columbia*: and the question was, whether the deed so given to *Marbury*, was valid and effectual to pass the property from *Fitzhugh*, the debtor, to *Marbury*, the trustee, who was not a creditor of *Fitzhugh*, and it was held, that it was, and that it vested *ab initio* the legal estate in the trustee, although the banks, for whose particular benefit it was made, had not expressed their assent to it, and were in fact ignorant of its execution at the time it was given. The debts due to the banks having been considered a valuable and fair consideration, and *Chief Justice Marshall*, who delivered the opinion of the court, using this emphatic language, “if *Fitzhugh* might have conveyed directly to the banks with power to sell for their own benefit, why might he not convey to *Marbury*, with power to sell and pay the money to the banks? If a real distinction exists between the cases, we are incapable of perceiving it.” And again, that a debtor “may sell to a fair creditor, or for the benefit of a fair creditor.” And the same doctrine is maintained in 2 *Kent’s Com.* 420.

In neither of the cases adverted to, was the deed of assignment executed by a corporation, but that it is conceived makes no difference, and that the principle is the same whether the deed be by a corporation or an individual. A corporation as well as an individual is bound to provide for

the discharge of its debts, and whether the payment is made by sale of property for that purpose, or with money from its vaults is not material. Its property may be seized and sold as in the case of an individual, under an execution for the payment of its debts. Why then, may not the corporation itself, instead of waiting for a judgment and execution, sell the same property for the payment of the same debt, for which it is liable to be sold under an execution? And as a *bona fide* assignment of his property by an insolvent individual to a trustee, for the benefit of his fair creditors, is a valid sale and transfer of the property for a valuable consideration, a like transaction by an insolvent corporation, in relation to property subject to its debts, is equally a good sale and transfer of it. No satisfactory reason has been advanced, and none is perceived why a corporation in failing circumstances, unless restrained by some express provision in the charter of incorporation, which is not the case here, may not assign its property to trustees, for the benefit either of preferred creditors, or of all its creditors equally, as well as an individual in insolvent circumstances. The same relation of debtor and creditor subsisting in one case, as in the other.

In *Catline vs. The Eagle Bank*, 6 *Con. Rep.* 233, the question was distinctly raised, on a bill to set aside a mortgage by the *Eagle Bank*, after it had failed, and was in fact insolvent, of its real estate, and an assignment of sundry promissory notes to a *Savings Institution*, a preferred creditor, and to subject all the funds that belonged to the bank at the time of its failure, to an equal distribution among all its creditors: and the court decided, that the mortgage and assignment to the *Savings Institution*, the preferred creditor, were good and valid, and could not be set aside by Chancery, and dismissed the bill.

If then, this had been a bill by an individual creditor, there could, it is believed, be little doubt that it could not have been sustained. Indeed it has already been determined by the judges of this court, in the case of the *Union*

Bank of Tennessee, a creditor to a very large amount, that this very deed is good and valid in law and equity: and the bank not being a person capable of taking the benefit of the insolvent laws of this *State*, is not within, or affected by the provisions of the supplements of 1812, *ch. 77, sec. 1*, and 1816, *ch. 221, sec. 6*, which declares, “that any deed, &c. made to a creditor or security by any person, with a view, or under an expectation of being or becoming an insolvent debtor, and with intent thereby to give an undue and improper preference to such creditor or security, shall be void.” The words “with a view, and under an expectation of being or becoming an insolvent debtor,” being held by settled construction to mean, “*with a view, and under an expectation of taking the benefit of the insolvent laws*, that is, of becoming a technical insolvent, and not a mere insolvent in fact; which view or expectation the bank could not have had, as it could not become an insolvent in the meaning of those laws, and the very provision shows the understanding of the legislature at least to have been, that without it, a deed made by an individual debtor, capable of taking the benefit of the insolvent laws, to a creditor or a surety, might be valid and effectual to pass the property; otherwise such a provision would have been unnecessary: and a deed for the benefit of all the creditors equally, or of a particular preferred creditor, that would be good in the case of an individual debtor in insolvent circumstances, as against an individual creditor not having a prior lien, would be equally good in the case of a bank in the same circumstances, as against the same description of creditor. But it is urged that the *State* has a preference in the payment of debts in cases of insolvency, and in this case has the right to have the amount of its claim first paid out of the funds of the bank, in the hands of the trustees, the bank being insolvent in fact when the deed was given; which right of preference is supposed not to be affected by the deed of trust: and the real question that we are called upon to decide is, whether the *State* is entitled to such preference.

This is a question of some delicacy and of much importance, both as it respects the amount in controversy, and the principle involved, and has received all the attention its importance entitles it to.

We have not been distinctly informed by the solicitors for the *State*, whether this preference, sometimes called in argument a prerogative preference, or priority, is claimed as being given by the act of the then province of *Maryland* of 1650, *ch.* 28; or as being derived from the common law; but it has been claimed and insisted upon, as a right devolved upon the *State*, by one or the other; though it has been principally asserted as a common law right, secured to the *State* by the third article of the declaration of rights of this *State*.

Although as has been observed, this preference has been chiefly insisted upon as a common law right, it may be proper to inquire, 1st, what rights were conferred by the acts of 1650, *ch.* 28; and 2d, whether it was in force at the time of the revolution.

First then, looking to the language of that act, and it would seem from the expressions used, that the preference was given to the *Lord Proprietary* personally, and to *his heirs*, as long, and so long only, as *they* should be the *Lords Proprietaries* of the province. The words of the act being, "that all debts which either are, or shall be, from time to time, really and truly due to his *Lordship*, or his *heirs*, *Lords*, and *Proprietaries* of this province, shall be first paid and satisfied within the said province, before any other debts whatsoever." And that whenever he, (the then lord proprietary) and his heirs shall cease to be the lords proprietaries of the province, the preference given to them was to cease also, and would not under that act devolve upon any other. And that when by the revolution, the proprietaryship was abolished, the preference attached to it sunk with it, and was not transmitted to the *State*, if the act giving it continued to be in force up to the time of the revolution.

But secondly, was it in force at that period? By an act of 1676, it was made perpetual. In 1689 the colony revolted, and the *Proprietary Government* was overthrown, and became a *Royal Government*; and so continued until 1716, twenty seven years, when the proprietary government was restored; during the whole of which time the priority in the payment of debts due to the proprietary, given by the act of 1650, *ch.* 28, was at least suspended. In 1692 when the colony was under a royal government, free from the dominion of the proprietary, by an act of that year, *ch.* 84, all the laws made in the province before that session of the legislature, including of course the act of 1650, *ch.* 28, were repealed. By the act of 1700, *ch.* 8, declaring what laws were in force, the repealing law of 1692, was expressly saved. The act of 1650, *ch.* 28, then, which had been repealed in 1692, was not in force from that time up to the year 1704, when a law of that year was passed declaring "all acts of assembly of this province, made and enacted at any time before the session of assembly, begun and held at the port of *Annapolis*, on the 26th of April, 1704, to be repealed and made void, except the acts of 1702, *ch.* 1, and 1696, *ch.* 24, and except the act for keeping good rules and order in the port of *Annapolis*, and which are not revived, saved, and enacted, this present session of assembly." This act of 1704, repealing all prior acts, but such as are embraced by the exception, was in force at the time of the revolution. But it is supposed that the act of 1650, *ch.* 28, was revived by the exception in the act of 1704, of "all acts *revived, saved, and enacted*" during that session; on the ground that the repealing act of 1692, being repealed by the act of 1704, the effect was, to revive all the acts repealed by the act of 1692, but the act of 1704, by repealing *all laws passed before*, necessarily repealed not only all prior repealing laws, but precluded the revival of all antecedent acts not saved by the exception. It cannot be understood, as meaning at the same time, both to repeal and revive the same law; and the exception could only have been intended to save such of the

antecedent laws, as had before, but at the same session, been revived, of which there were several—and that is shown by the express exception of the acts of 1702, *ch.* 1, and 1696, *ch.* 24, and the act for keeping good rules and order in the port of *Annapolis*. The words, “revived, saved, and enacted,” meaning such acts as had been expressly revived, and enacted, otherwise the language would have been, *which are not hereby revived*; to revive a law by repealing a repealing law, not being to enact it. The fact that in 1704, there was no proprietary government, or lord proprietary, and had not been for fifteen years before, and was not for twelve years after, with no prospect in 1704 that it would ever be restored, is of itself sufficient to show, that it was not the intention of the legislature to revive the act of 1650, *ch.* 28, giving the priority which was conferred on the lord proprietary by that act as the head of the government, when there was no such government or head, or prospect of it. Besides, at that very session of 1704, an act was passed, *ch.* 42, stripping him, who fifteen years before had been the lord proprietary, of a grant of duties on tobacco given in 1671, and granting the same duties to the crown. Can it then be supposed that the same legislature, so dealing with other antecedent grants, intended to revive a personal preference when there was no proprietary to exert it.

And again, if the act of 1704, by repealing the act of 1692, revived the act of 1650, *ch.* 28, which had been repealed by the act of 1692, it also revived all the other laws repealed by the latter act, among which was the act of 1650, *ch.* 23, declaring the then proprietary to be “true and absolute lord and proprietary of the province.” And will it be said, that in 1704, when there was no proprietary government, nor for twelve years afterwards, the government of the province being then a royal government, the legislature intended to revive the act of 1650, *ch.* 23, declaring *Cæcilius, Lord Baron of Baltimore*, to “be true and absolute lord and proprietary of the province.” To ascribe to them that intention would be to be impute to them

a gross absurdity. And yet, if the words, which are not *revived, saved, and enacted, this present session of Assembly,*” had the effect to revive that act of 1650, *ch. 28*, being quite as applicable to one as to the other, and which cannot be admitted. The priority then, that is claimed in this case, was not derived to the *State* by the act of 1650, *ch. 28*, which it is conceived was not in force at the time of the revolution.

This brings us to the inquiry, whether it is given by the third article of the declaration of rights, made on the third of November, 1776, which declares, “that the inhabitants of *Maryland* are entitled to the common law of *England*, and the trial by jury, according to the course of that law, and to the benefit of such of the *English* statutes as existed at the time of their first emigration, &c., and also to all acts of assembly in force on the first of June, 1774, except such as have since expired, or have been, or may be altered; &c. This asserted priority has been denounced, as an odious prerogative, springing up in the barbarous and tyrannical ages of the *British* government, and inconsistent with the genius of our people and the spirit of our institutions; and it is contended that the object of the third article of the declaration of rights, was only to secure to the inhabitants of the State the benefit of the common law as a system of laws, or rules of action, in questions of *meum* and *tuum* arising between individuals.

It is not our purpose to inquire into the origin of this royal prerogative right of preference in the payment of debts, as it formerly existed in *England*, or to trace it through its various statutory modifications. It is enough that it constitutes a branch of the common law of *England*, and that the common law has been adopted in this State, by the general terms of the declaration of rights. The only question is, whether that branch of the common law has been adopted. To the suggestion, that the common law was only adopted as a rule of action in controversies between individuals, the answer is this; if it was only adopt-

ed to that extent, whence did we derive our whole system of criminal jurisprudence, depending upon the principles of the common law, and having no relation to controversies in civil suits between individuals.

But in *The State vs. Rogers and Wife*, 2 Harr. and McH. 198, in 1787. *Murray and Sansom vs. Ridley, Adm'x of Ridley*, 3 Harr. and McH. 171, in October, 1793. And *Contee vs. Chew's Ex'r*, 1 Harr. and Johns. 417, in 1803, it was held, that at common law the *State* had a preference, and a right to be first paid out of the estates of deceased persons, where no liens stood in the way. These cases were decided in the late general court, and were not appealed from, but acquiesced in by the parties contesting the right. And in the *State vs. Buchanan*, 5 Harr. and Johns. 317, 358, and *Dashiel vs. The Attorney Genl.* *Ib.* 392, 401, it was decided by this court, that the common law was adopted by the third article of the bill of rights, "so far at least as it was not inconsistent with the principles of that instrument, and the nature of our political institutions."

It is too late therefore, at this day, to deny the *State's* right at common law, to have its debt first paid out of the property of its debtor remaining in his hands, and no lien standing in the way. For notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principles or spirit of our political institutions. It does not indeed exist here with all the incidents to the royal prerogative right in *England*. We have not the writ of protection, nor the extent in chief, or in aid. And the priority of the *State* is a rule only in the distribution of the property of the debtor, requiring the debt due to the *State* to be first paid, where the individual creditor has no antecedent lien overreaching it.

The government of the *State* is established for the good of the whole, and can only be supported by means of its revenue; which revenue the good of the whole requires to be protected. And as it can only act by its agents, who no matter how vigilant, cannot always be present to protect

The State of Maryland vs. The Bank of Maryland.—1834.

its rights, a priority in the payment of its debts, (which must always be of a public nature) is necessary to enable it to accomplish the ends of its institution.

It is not therefore opposed to a sense of right, that the interests of all should prevail over that of an individual, when it can be asserted without disturbing vested rights; which diligent creditors can more readily acquire than the government through its agents. And the *Congress of the United States* proceeding upon the like principle, and feeling the necessity for it, has in certain cases given a preference to debts due to the general government.

Assuming then this right of priority to belong to the *State*, in cases to which it can attach; the remaining inquiry is, whether this is a case of that description, or whether the priority of the *State's* claim, which would otherwise have existed, and might have been enforced, has not been defeated by the act of the bank.

The debt due from the bank to the *State*, is a debt on simple contract only, and not a lien, as is, and must be conceded. The *State* therefore having no lien on the property covered by the deed of trust, but a priority only, in the payment of its claim, if that right of priority has not been lost, it is subject, claiming under the common law, to the same common law rule, applicable to the royal prerogative right of priority in *England*, of the same description. That right in *England* is enforced by the process in the writ of extent in chief, or in aid, according to circumstances, and may be here, by proceedings known to our courts. But in either case, to make it available, the proceeding must be resorted to, before other vested rights to the property sought to be subjected to the claim are acquired.

In 2 *Tidd's Pr.* 1098, 1099, the law upon that subject is thus laid down, "when goods are *bona fide sold*, or fairly assigned by the king's debtor to the trustees for the benefit of his creditors, before the *teste* of the extent, they cannot be taken under it, even though in the latter case the debtor was a trader within the bankrupt laws, and the assignment

was an act of bankruptcy.” And the examples put by that writer are these. “A factor to whom goods have been sent for sale, and who has accepted bills of exchange drawn on him by his principal to the amount of their value, has a lien on such goods and the purchase money, which lien is available against the crown, when the goods or money have been seized under an extent against the principal for a debt due to the crown. So goods pawned or pledged before the *teste* of an extent cannot be taken under it; because the pawnee, or bailee, has a special property in them; nor for the same reason goods demised, or let to another for a term certain, during the term. But it seems that goods pawned before the *teste* of the extent may be taken as against the pawnee, on satisfaction of the pledge.” And in 1099, “that an extent will not operate upon the goods of a bankrupt actually assigned before the *teste* of the extent.” The same doctrine is also to be found in *Chitty’s Prerogative of the Crown*, 285, and in 281, 284, that the extent is an execution, and binds the defendant’s goods *only* from the *award* of the execution. And these writers are fully sustained by the adjudged cases upon the subject. The case of the *King in aid of Braddock vs. Watson and another*, in 3 *Price’s Reports of Cases in the Exchequer* 6, was the case of an extent in aid against the goods of an insolvent debtor of the king’s debtor, (between the effect of which, and an extent in chief, there is no difference) where the insolvent debtor having before the *teste* of the extent assigned his goods for the general benefit of all his creditors, (which was an act of bankruptcy, he being at the time a trader, and within the bankrupt laws) it was held, that the goods were protected by the assignment against the operation of the extent.

The King vs. Lee and others, 6 *Price*, 369, decided in the exchequer, is the case of an extent in chief, issued against an immediate debtor of the crown, who before the *teste* of the extent had sent his goods to a factor for sale, who had accepted bills of exchange drawn on him by the debtor to the amount of the value of the goods; and it was ruled

that the factor had a lien on the goods that was available against the claim of the crown; with a recognition by the court, of the principle, that goods pawned or pledged before the *teste* of the extent cannot be legally seized under it. And in *Giles vs. Grover and another*, decided in the house of lords, 1 *Clark and Finley*, 72, it is treated as a settled doctrine, that goods seized and sold by the sheriff under a *fi fa*. before the *teste* of an extent in chief, or in aid, cannot afterwards be taken under that writ to satisfy a debt due to the crown. And it is conceded throughout, in the elaborate arguments of the judges, “that the crown under its process against its debtor cannot seize the property of another. That when the property has passed from the debtor to another by contract, or a fair and *bona fide* transfer before the *teste* of the extent, or under a sale by a sheriff in virtue of a *fi fa*. the extent comes too late, and the priority of the king is lost; and that the crown cannot by its extent avoid an antecedent equitable mortgage, or lien of a factor, or of a wharfinger, or a *bona fide* assignment in trust for creditors, or any other similar assignment or charge; because they are created when the debtor has legal power and authority to create them, and attach upon the goods before the process of the crown; and the crown can only take the goods subject to such liabilities as the debtor has legally created.”

We have endeavored to show that this is a fair and *bona fide* assignment for a valuable consideration, and passed the property from the *Bank*, and beyond its power or control. If so, and a similar assignment in *England* has the effect to protect the property against the king's extent, and to defeat his priority, (as we have seen it does) it has equally the effect here, to protect the property in the hands of the trustees against the common law priority of the State. But this has been assailed as a voluntary assignment by the *Bank*, and is therefore supposed to be void as against the *State's* claim, not having been made on the solicitation, or by the coercion of its creditors.

We have seen, that being in trust for the equal benefit of all the creditors, it is not void under the statute of the thirteenth *Elizabeth*. In the *King (aid of Braddock) vs. Watson and another*, 3 *Price*, 6, the assignment was not made at the instance of creditors, but being for their general benefit, it was held to be good against the crown. In *Marbury vs. Brooks*, 7 *Wheat.* 556, and 11 *Wheat.* 78, the assignment was for the particular benefit of certain creditors, (several banks) made not only not at their instance, but without their privity; yet it was held to be good, and the assent to it of the preferred banks presumed, they having expressed no dissent.

The attempt to assimilate the condition of the *Bank*, after the execution of the deeds, to that of a deceased debtor, on the supposed ground that the *Bank*, by the transfer of all its property thereby became dissolved, and ceased to exist as a corporation, rests on no stronger basis.

An executor or administrator takes the funds of the deceased to be distributed according to law, subject to such preferences as the law allows. The moment the debtor dies the law asserts the rights of the creditors, and takes the property into its hands, and makes or directs the distribution of it according to their priority, that being the law of deceased person's estates, which a testator cannot by his will defeat.

Not so in the case of a bank; its funds are in its own hands, and not in the hands of the law; and like an individual, it has the power and authority to pay or transfer them to or for the benefit of its creditors. And although it should by a transfer of all its property render itself powerless to discharge the ordinary purposes of its institution, it still remains a living or existing corporation. But if a mere assignment of all its property, could of itself have the effect to dissolve a corporation, it could only be on the ground, that the deed of assignment was valid and effectual to pass the property out of the corporation—otherwise if the deed was void, the property would remain in the corporation, and it would stand as if no such deed had been made.

The remaining ground taken by the solicitors for the *State* is, that admitting the deed to be good, and the *State* entitled to come in under it *pari passu*, with the other creditors, that at once brings the right of the *State* into conflict with the rights of other creditors, and thereby entitles it to a preference to the whole amount of its debt—which might be answered by a reference to the case of the *King (aid of Braddock) vs. Watson and another*, 3 Price, 6, where the assignment was for the equal benefit of all the creditors.

But the proposition amounts to this; that the deed is to be first set up as good and valid, in order to let in the *State* to a just proportion of the funds under it, and then to be overthrown to give to the *State* the entire fund, which cannot be; the deed cannot be good and bad at the same time. If void, and the *State* goes for the whole of its debt, (and it can only do so on the ground of its being void) it must claim adversely to the deed. If good, (and we have said and endeavored to show that it is) it has lost its preference and can only take its just proportion, according to the provisions of the deed. And taking under the deed, there is, and can be no conflict of rights between the respective parties, each creditor's right being only to a just proportion, without disturbing the right or claim of any other. And when neither has a right to the proportion of the other, but each only to his own separate and distinct proportion, how can there be a conflict of rights. It is not like a case of the concurring rights of the king and subject creditor, each seeking to obtain and secure the whole or the same thing, would be a case of conflict. As where there is an execution by the subject, and an execution or extent by the king, before the right or title of the subject is consummated; in such case the king's extent has the preference. But if the property be fairly and *bona fide* changed, or the right of the individual creditor be completed before the extent, either by sale under *fi fa*. or a valid conveyance to him, or to a trustee for his benefit; the extent coming afterwards

Biscoe vs. Biscoe — 1834.

will be unavailing. There being no point of time at which the two rights were in conflict, and nothing for the extent to act upon, after the property ceases to be the property of the debtor. The right of the *State* being only against the property of its debtor, and not against the property of its debtor's creditor.

We are therefore of opinion, that the preference which the *State* had, so long as the title of the property remained in the *Bank*, is defeated by the deed of trust, and the decree must be affirmed.

DECREE AFFIRMED.

THOMAS KAYTON BISCOE vs. LANGLEY BISCOE.—
December, 1834.

A by her will devised as follows: "I give unto my nephew J, my slave *Samuel*; in case the said J should die without lawful heir of his body, I then give the said slave *Samuel* to my nephew T." HELD, that this limitation over to T, being of a *man* slave, was not too remote, and therefore not void. In relation to executory bequests of personal property dependent upon a dying without lawful heir, or leaving issue, &c., the language of the will may be restricted to mean a dying without issue living at the death of the first taker or another person *in esse*, by any clause or circumstance in the will, that can indicate such intention in the testator; and in order to support the limitation over, the courts, in such cases, generally incline to lay hold on any expression or circumstance in the will, that seems to afford a ground for such a construction.

So when the subject of the bequest was a *negro man*, a life in being, and the limitation over could never by possibility take effect, but in his life-time, as the term of the servitude must expire with his life, this was held to be a circumstance indicating the intent of the testator, which would qualify a limitation over, otherwise too remote, and void upon general principles.

APPEAL from *Saint Mary's* county court.

This was an action of *Replevin*, instituted by the appellant against the appellee, on the 25th of November, 1831, for a negro slave named *Samuel*; the title to whom depend-

ed upon the following clause in the will of *Anna Biscoe*, dated 8th March, 1824, and proved on the 11th of May, of the same year.

“Item, I give and bequeath to my nephew *John McKay Biscoe*, my slave *Samuel*; in case the said *John McKay Biscoe* should die without lawful heir of his body, I then give the said slave *Samuel*, to my nephew *Thomas Kayton Biscoe*,” (the plaintiff in this action.)

The title of the testatrix to the negro was proved; and that *John McKay Biscoe* died in July, 1831, without ever having had a child.

Upon this proof, the county court, (STEPHEN, Ch. J.) upon the prayer of the defendant, instructed the jury, that the limitation over to the plaintiff was void. The plaintiff excepted to the instruction, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and DORSEY, and CHAMBERS, J's.

John M. S. Causin, for the appellee, contended,

1. That the intention of the testator as displayed upon the face of the will, furnishes the rule for expounding devises, unless such intention is opposed to some principle of law. 2 *Bur.* 1106, 1112. 1 *Ib.* 50, 51.

In this case it is impossible to suppose the testator intended the limitation over should take effect, after an indefinite failure of issue. Long before that event would happen in the ordinary course of nature, the slave, the subject of the bequest, must die. If the limitation over take effect at all, it must do so in the life-time of the slave, and this must have been known to the testatrix. The testatrix intended, that if the first taker died leaving issue at the time, the limitation over should fail. She could not, when disposing of a human being, whose life is limited by the laws of nature, have looked to an indefinite failure of issue.

In bequests of personal estate, the words, dying without issue, mean a definite failure of issue. 1 *Pr. Wms.* 534, 667. 3 *Ib.* 260. 13 *Ves.* 340. 1 *Harr. and Gill*, 111, 116. 4 *Harr and Johns.* 441. *Fearne*, 224, 225. The rule that words, which will give an estate tail in real estate, will give an absolute estate in personalty, does not apply here; as if the first taker under this will take an estate tail, it is by implication, and the rule only applies to estates tail created by express terms. 3 *Pr. Wms.* 259.

Johnson for the appellee.

The limitation over to the plaintiff is too remote, and is not good, as an executory bequest.

The question is not whether the estate must take effect within the prescribed time, but whether the *contingency* upon which it is made to depend, must happen within the limited period. *Dallam vs. Dallam*, 7 *Harr. and Johns.* 220. 1 *Harr. and Gill*, 111. *Hoxton vs. Archer*, 3 *Gill and Johns.* 199.

Looking alone at the first part of the clause of the bequest in question, and the first taker would have an absolute estate; and the enquiry is, whether the words afterwards employed, mean that, that estate should be defeated by a definite failure of issue.

In the case of real estate, the devise over being for life, or to a survivor, will not make the limitation good, if it is made to depend upon an indefinite failure of issue. There must be some term, such as "*leaving issue*," to limit the general terms of the devise. The limitation over to the plaintiff, is of an absolute estate; as much so, as though the slave had been given to him and his heirs, upon the occurrence of the contingency of the first taker dying without heirs of his body, and there is nothing to prevent its taking effect, even if the plaintiff had died before the death of the first taker, and in that event his representatives would be entitled. 4 *Harr. and Johns.* 441. 2 *Harr. and Gill*, 42,

125. The words used by the testator, are technical, and must be construed technically.

BUCHANAN, Ch. J., delivered the opinion of the court.

It is a well known and inflexible rule, which hardly needs to be stated here, that no limitation can be good and operative as an executory devise, unless it be upon a contingency that must happen, if at all, within a life or lives in being, and twenty-one years, and a portion of a year afterwards, allowing for the time of gestation; and that if it be upon an event, or contingency, which *may*, or *may not* happen within the prescribed limits, that the limitation is void *ab initio*, and cannot take effect, notwithstanding the event should afterwards in fact occur within the time allowed by the rule for the happening of a contingency, on which an executory devise may be limited: the ingredient, *that it must happen*, (if ever) within the limits which the law prescribes, and not that it *may*, or *may not* happen, being wanting to the validity of such executory estates.

The rule being, not that the *limitation over* is to take effect within the time allowed, but that the *contingency* on which it is made to depend, *must happen*, if at all, within the prescribed limits. This rule applies as well to executory bequests of personal property, as to executory devises of real estate. With this difference in the practical application of it, remarked upon in *Dallam vs. Dallam*, 7 *Harr. and Johns*. 220, and *Newton and Griffith*, 1 *Harr. and Gill*, 111, that in relation to personal estates, courts generally incline to pay attention to any circumstance, or expression in the will, that seems to afford a ground for construing a limitation after dying without issue, &c., to be a dying without issue, living at the death of the party, in order to support the bequest over; but that in the case of real estates, the construction is generally otherwise, in favor of the heir whose interest is concerned, which is always much favored by the law. *Fearne on Remainders*, (by Butler) 476, which is exemplified in *Forth vs. Chapman*, 1 *Pr. Wms.* 663; where the

testator gave the residue of his real and personal estate to his two nephews generally, with a limitation over to another, in case either of them should die and *leave no issue of his body*.

There was a disposition for life in the same clause of a will of real and personal property, with a limitation over on the event of a dying without *leaving* issue; and it was held, that the devisees of the freehold, took an estate tail, the contingency being too remote to support an executory devise, and that the limitation over of the *personal* estate, was good by way of executory bequest, by force of the word *leave*. The words *leave no issue*, when applied to a disposition of *personal property*, being construed to mean a failure of issue at the time of the death of the first taker; and when applied to a disposition of *real estate* to mean (in favor of the heir) an indefinite failure of issue, which seems to be an almost imperceptible shade of distinction. It has, however, become a settled rule of construction. But "*Lex plus laudatur, quando rationi probatur.*"

The distinctions too, in relation to executory limitations of personal property, between dying *without* issue, and dying without *leaving* issue, appear to be very subtle; seeing that if the reason for the avidity of courts to seize upon slight circumstances to support such limitations be, (as is sometimes said,) that the issue of the first legatee can under no construction take; the same reason applies as well to the former, as to the latter set of words. Still it has become a settled distinction not now to be overturned. For it is the established law, that whenever an executory devise, or an executory bequest, is limited to take effect after a dying without issue, or without heirs, &c., subject to no other restrictions, the limitation is void. The rule being in relation to personal property, that if the limitation be, after a dying without issue, &c. generally, without the concurrence of any other circumstance of intention, those words shall not, *ex vi termini*, signify a dying without issue then living; but if the limitation rests solely upon the usual in-

tent and import of those words, the limitation over is too remote, and therefore void, and the whole vests in the first legatee; and that on the other hand, when there is any other circumstance of intention, these words shall not *ex vi termini*, import an indefinite failure; but that the signification of those words may be confined to a dying without issue then living, by any clause or circumstance in the will, which can indicate or imply such intention, (*Butler's Fearne on Remainders*, 485,) and effect be thus given to the limitation over. And it matters not whether the estate be limited to the first legatee indefinitely, or for life expressly, or such legatee and his heirs or heirs of his body, or issue, or children, the restriction is equally valid. *Ib.* 478, 479. In this case, the words of the will are, "I give and bequeath unto my nephew *John McKay Biscoe*, my slave *Samuel*; in case the said *John McKay Biscoe* should die without lawful heir, I then give the said slave *Samuel*, to my nephew *Thomas Kayton Biscoe*. *John McKay Biscoe* died without having ever had any issue; and the question upon the construction of the will is, whether those words "die without lawful heir of his body," mean *an indefinite*, or a definite failure of heirs of his body.

If the limitation over is to be considered as resting entirely upon the usual extent and import of those words, as settled in legal understanding, there can be no question that it is too remote, and therefore void, and that the whole property in the negro vested absolutely in *John McKay Biscoe*.

We have seen the rule to be, that the *contingency* on which the limitation is made to depend, must happen, if at all, within the prescribed limits; and that if an executory devise or bequest, be limited to take effect after a dying without issue, or without heirs, &c. subject to no other restriction, the limitation is void. But we have also seen, that in relation to executory bequests of personal estates, those words may be restricted to mean a dying without issue living at the death of the party, by any clause or cir-

cumstance in the will, that can indicate or imply such intention in the testator, and that in order to support the limitation over if they can, courts generally incline to lay hold on any expression or circumstance in the will, that seems to afford a ground for such a construction; as appears by the construction given to the expressions, *leaving* no issue, or without *leaving* issue, &c. when used in a limitation of *personal* property, though in the same clause of a will, making a disposition of both *real* and *personal estate*. So that, although the *contingency* on which the limitation is to depend, is required to be such as must happen, if ever, within certain prescribed limits; yet whether that be the character of the *contingency*, depends upon the sense in which the testator, from any clause or circumstance in the will, is supposed to have used the expressions, *dying without issue*, &c.

If the limitation rests solely upon the received import of these words, subject to no other restriction arising from any expression, or circumstance of intention, the testator is to be supposed to have meant an *indefinite* failure of issue; but if on the other hand, there is any clause or circumstance in the will, which can indicate or imply, that he intended a dying by the first legatee without issue then living, or a definite failure of issue, the words may be so construed, and the limitation restricted to that event.

Is there any such clause, or circumstance of intention in this will? It has been held, that a limitation over for *life* to one in *esse*, after a dying without issue, may be good. *Butler's Fearne*, 488, 489. 2 *Thos. Co. Litt.* 648, 649. (note C.) *Lyde vs. Lyde*, 1 *Term. Rep.* 593. *Trafford vs. Boehm*, 3 *Atk.* 449. Because the future limitation being only for *life*, of one in *esse*, it must take effect during that life or not at all, and therefore the failure of issue in that case, is confined to the compass of a life in being. The circumstance too, of an executory bequest being for *life*, to one in *esse*, and therefore must take effect if at all during his life, is supposed to be a concurring circumstance to

indicate that the testator intended a definite failure of issue; a circumstance of intention in the will.

But of the cases to be found in the books, that which perhaps comes as near to this as any other, is the case of *King vs. Cotton*, 2 *Pr. Wms.* 676, in which there was a demise by a *tenant for life of land*, to trustees, for ninety-nine years, if she should so long live, in trust for herself during her widowhood; and after marriage, in trust for her second son and the heirs of his body, and if he should die without issue, then in trust for her third son; and *Fearne*, (by *Butler*) 489, in his notice of that case, treats the limitation over of the trust for the third son, as a good limitation. Because it could not possibly take effect, unless in the life-time of the tenant for life of the land, the whole term being to determine on her death, and there could be no perpetuity. That was a demise of a term in trust, but executory devises and limitations of the trusts of a term, are governed by the same rules.

In that case, it is to be observed, that as the term, the thing given, was necessarily to expire with a life in being, it may reasonably be inferred from that circumstance, that a dying without issue during the continuance or existence of the term, the thing given, or in the life-time of the tenant for life, was intended, and not an indefinite failure of issue; thus restricting the words *without issue*, to mean a failure of issue within the compass of a life in being.

In this case, the subject of the bequest, the thing given, is a negro man, a *life in being*, and the limitation over could never by possibility take effect, but in his life-time. May it not therefore be a reasonable construction, to confine it to a failure of issue during a life in being, the life-time of the negro man himself, the subject of the bequest? Looking to the circumstance that the subject of the bequest is a slave, whose term of servitude must expire with his life, as a circumstance inconsistent with the supposition of an *indefinite* failure of issue, and therefore indicating that such was not the intention of the testatrix, but that she meant to

restrict the limitation over to a failure of issue, suitable to the durability of the subject of the bequest, that it is to a dying by the first legatee without issue, in the life-time of the negro man.

We have seen that executory bequests limited to take effect after a dying without issue, &c. may be good, and those words construed to mean, a definite failure of issue, by means of expressions and circumstances in the wills, not stronger certainly than that which characterises this.

There has been no case adjudged in *England* exactly like this, there being no such description of property in that country; but it is apprehended, that if such a case had ever arisen there, the limitation over would have been held to be good.

Nothing can be more improbable, than that the testatrix meant an indefinite failure of issue; as she must have intended by the limitation some benefit to the legatee over, which she well knew could not possibly be, unless there should be a failure of issue of the first legatee, during the life of the negro man, he being the subject of the bequest. It is therefore only consistent with reason to suppose, that she intended such a failure of issue; and if so, and the character of the subject of the bequest can be taken as a circumstance in the will, to indicate such an intention, there is no rule of law to forbid that construction, in support of the limitation over, the character of the contingency (whether definite or indefinite) being to be judged of and determined, by any circumstance of intention to be found in the will. And here, the testatrix knew, that unless the first legatee should die before the negro man, having no issue alive at the time of his death, that the limitation over could never take effect. She must therefore have intended such a dying. It is the only reasonable construction that can be put upon the bequest; and the circumstance pointing to that intention, indicates it quite as strongly as the word *leaving*, which is held to be sufficient to support an executory limitation of personal property.

It will not be contended, and there is surely no principle of law to sustain the proposition, that no limitation of personal property after a dying without issue, &c. can be valid and effectual, unless it be after a dying without issue then living of the first legatee. A limitation may be after a failure of issue of the first taker, in the life-time of another in *esse*, or after a dying within twenty-one years, after a life in being.

In *Pells vs. Brown*, Cro. Jac. 590, which, by the way, was a devise of *lands* by a father, to his son *Thomas* and his heirs, and if he died without issue, living *William*, then over to *William* and his heirs, it was adjudged, that the limitation over to *William* was good as an executory devise, on the ground that the words, *without issue*, as there used, were explained and restricted by the words, *living William*, to mean a dying by *Thomas* without issue in the *life-time of William*; and that case is the foundation of this branch of the law.

So, where there was a devise to a woman for life, and after her death, to such child as she was supposed to be *enceinte* with, and the heirs of such child, with a limitation over, if such child as should happen to be born, should die before the age of twenty-one years, it was held to be a good executory devise, as it was to commence within twenty-one years after a life in being, and that if the contingency of a child being born never happened, then, that the limitation was to take effect on the death of the woman. *Gulliver vs. Wickett*, 1 Wils. 105. *Butler's Fearne*, 396. *Smith vs. Hallock*, 7 Taunt. 129, 140.

Here, the bequest is substantially of a negro man, and if the first legatee should die without issue, living the man, or in the life-time of the man himself, (a life in being) then over. Not very different it would seem, from the case of *Pells vs. Brown*, where the limitation was, after a dying without issue, *living William*. The cases in the *English* books in which limitations after a dying without issue, &c. have been held to be bad, are cases in which the subjects of

the devises would, (being of lands,) or of the bequests, (being of personal property,) might continue to exist beyond the limits prescribed for such limitations. But not so here, where the subject of the bequest must cease to exist with the life of the man bequeathed.

If the limitation had been in terms, *if John McKay Biscoe should die without issue in the life-time of this negro man*, could a doubt be entertained that it would have been good, on the ground of its being made to depend on a contingency to happen within the compass of a life in being, the life of the man himself; and is not the inference, that such was the meaning of the testatrix, as irresistible, as if it had been so expressed.

Our attention has been called to the case of *Johnson vs. Negro Lish*, 4 Harr. and Johns. 441, decided by this court, which it was supposed must govern this. But it will be seen that that is a materially different case. That was the case of a deed of gift, in which the limitation was of a woman and *her issue*, after a dying without issue, a circumstance taken notice of by the judge who delivered the opinion of the court, and which looks to an indefinite failure of issue, as the issue of the negro woman might continue as long as the issue of the first taker.

There is also another case, *Davidge vs. Chaney*, 4 Harr. and McHen. 393, which was indeed the case of a will, but there too, the limitation was of two negro women and their issue.

This opinion has been extended further than was at first contemplated, or was perhaps necessary, but being a new question in this State, it has been thought proper to examine it more fully, than otherwise would have been done.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

ZADOCK SASSCER vs. JAMES YOUNG & JAMES KEMP.—
December, 1834.

Where the plaintiff levies his execution upon the defendant's real property, and after several writs of *vendi* successively issued, the sheriff, by the order of the plaintiff's attorney, returned the *vendi* "not sold by order of the plaintiff's order," and no further steps had been taken; this state of the fact will not authorise the security of the defendant in the appeal bond, which had been given upon the appeal taken from the original judgment at law, to apply to a court of equity for an injunction to stay proceedings against such security founded upon a judgment on the appeal bond against him.

A creditor by making a *new agreement* with his debtor, inconsistent with the terms of the original agreement, or any alteration in those terms, or in the mode or the time of performing them, without the assent of the surety of such debtor, thereby discharges the surety.

A creditor may forbear during his pleasure the rigorous prosecution of his demand, and may accordingly remain inactive, reposing upon the faith of the security he has taken.

A security who has become chargeable by a forfeiture of a contract, or its non-performance by the principal, in the manner, and at the time agreed upon, may insure a prompt prosecution, either by discharging the obligation, or becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed by an application to a court of equity.

It is a general rule, that where parties have had an opportunity to use a particular state of facts as a defence at law, courts of equity will not relieve upon the ground that by neglect or accident it was not made use of, or failed on being attempted.

Where a suit was brought by plaintiffs as executors, and they recovered judgment, and then revived the same judgment by *scire facias* as executors, from which an appeal was prayed, and an appeal bond executed to the plaintiffs as executors, and judgment was obtained upon such bond by one of the original plaintiffs as surviving executor, it is too late for the surety in the bond to insist in equity that the plaintiffs never were executors, or sued upon letters granted by a foreign jurisdiction.

APPEAL from the equity side of *Prince George's* county court.

The present bill was filed by the appellant on the 27th of November, 1833, for an injunction, and general relief against a judgment in favor of *Young*, one of the appellees,

CASES IN THE COURT OF APPEALS

Sasscer vs. Young and Kemp.—1834.

rendered by the *court of Appeals* at June term, 1833, against the appellant, as one of the sureties of the other appellee, *Kemp*.

In addition to the facts charged in the bill, as stated by the judge who delivered the opinion of the court, there is the following allegation. "That the said executors, if they have never received the money, have lost it by their own negligence; for after taking sufficient to discharge the debt, they have grossly neglected to have it sold, and have in fact by their attorney directed it not to be sold."

Upon the coming in of the answer of *Young*, the injunction which had been previously granted was dissolved. And from the order of dissolution an appeal was prayed, and granted, under the provisions of the act of 1832, *ch.* 197.

The argument in this court was had before BUCHANAN, Ch. J., DORSEY, and CHAMBERS, J's.

Johnson, and *T. F. Bowie*, for the appellant, contended,

1. That the bill made a proper case for equitable interposition, and as the answer does not deny that case, but relies on the introduction of new matter, the injunction should have been continued until the final hearing. 1 *Harr. and Gill*, 81. 4 *Johns. Ch. R.* 497. 1 *Gill and Johns.* 270.

2. That by waiving the execution against *Kemp*, the principal, which is not denied by the answer, the surety was discharged. 2 *Swanston*, 197. *Theobald*, 143. 4 *Ves.* 832. 2 *Ib.* 539, note (1.) 5 *Gill and Johns.* 352. 2 *Johns. Ch. R.* 559. 12 *Mass.* 154. 4 *Ib.* 123.

3. The grounds of relief relied on here would not have constituted a defence at law. The objection to the creditor's right to recover, is not that *he gave time* to the principal, which possibly might be relied on at law; but that he surrendered securities, which is peculiarly a subject for equitable relief. And besides, in the case of *Walker and Sasscer*, 5 *Gill and Johns.* 102, the facts upon which this application is based were decided to be no legal defence.

Alexander, for the appellee.

A surety is not discharged by the creditor, or his attorney's directions to the sheriff, not to sell property taken under a *fi fa*. *Planter's Bank vs. Selman*, 2 *Gill and Johns*. 230. *Salmon vs. Clagett*, 5 *Ib*. 314. *Crawford vs. Berry*, 6 *Ib*. 63.

It is not alleged in the bill, that the act complained of caused loss to the surety; but if such allegation had been made, the facts charged would have furnished a defence at law. 5 *Gill and Johns*. 102.

The directions given to the sheriff might have been countermanded at any time; and although not countermanded, it was perfectly competent for the surety to pay the debt, and proceed with the execution for his benefit, as if no such directions had been given. No right or privilege of the surety was in the slightest degree invaded, and consequently he has no reason to complain.

That part of the answer which speaks of the value of the property seized under the *fi fa*. is explanatory of other portions strictly responsive to the bill, and is therefore to be considered upon this motion.

CHAMBERS, J., delivered the opinion of the court.

The bill of complaint in this case alleges, that a judgment was obtained in 1817, by *Young, Emack, and McCormick*, as executors of *Walker*, against *Kemp*, which was afterwards revived by *scire facias* between the same parties, and on appeal to this court affirmed at June term, 1826.

A *fieri facias* issued on this judgment, was levied on certain real property in *Prince George's* county, which not having been sold, "two or three" writs of *venditioni exponas* were successively issued, to the last of which the sheriff returned, "not sold by order of the plaintiff's order," and no further process has since issued.

Upon the appeal to this court, an appeal bond had been executed by *Kemp*, in which *Sasscer* was a surety; and *Emack* and *McCormick*, two of the executors having died,

during the proceedings on the judgment against *Kemp*, suit was instituted on the appeal bond by *Young*, the surviving executor, against the appellant, the security, in which action judgment was obtained in the county court, and affirmed in this court at June term, 1833.

The bill claims relief on the ground, that the order of the plaintiff's attorney, reported in the sheriff's return, and the failure to renew the process, and sell the property taken in execution, has discharged him as a surety.

There is also another ground assumed in the bill in more doubtful terms, and that is, the discovery since the judgment against the appellant, that the letters testamentary to *Young*, *Emack*, and *McCormick*, were either never issued, or if at all, from a court in the *District of Columbia*, and not in *Maryland*.

An injunction issued upon this bill to stay proceedings upon the judgment against *Sasscer*.

The answer of *Young* admits the rendition of the judgments, the issuing of the *feri facias*, seizure of the property, and the issuing of the writs of *venditioni exponas*, and return as stated in the bill, alleging however, that the defendant, *Kemp*, had no title or interest in the property, but that he held it in virtue of a contract of sale, and that the vendor had sold it on a judgment for the purchase money. It also admits, that the letters testamentary were issued in the *District of Columbia*.

The court upon this answer ordered the injunction to be dissolved, and an appeal from that order has been prosecuted under the act of 1832, *ch.* 197. We are therefore to consider whether there has been error in the court in dissolving the injunction.

We will first dispose of the objection to the letters testamentary. The original suit was instituted, and prosecuted to judgment, by *Young*, *Emack*, and *McCormick*, as executors. The *scire facias* was issued, and prosecuted to judgment by the executors. The appeal bond was executed to them as executors. The action on that bond was insti-

tuted and prosecuted to judgment against the appellant by *Young*, as surviving executor, and in all this period of sixteen years, no exception is taken to the rightful authority conferred by these letters.

The bill does not set forth the proceedings in the original action against *Kemp*, and indeed there is a great dearth of information as to the dates even, of the judgments, executions, or appeal bond, but there must have been a profert of the letters in the first suit, and a plea of *ne unques* executor would have been a complete bar if the facts now alleged had been proved.

No practice or principle can justify the court now to interpose its equitable powers on this ground.

Do the facts then disclosed in the bill entitle the appellant to relief? The question is proposed in this form, because without stopping to determine how far the want of title or interest in the property alleged in the answer is new matter as contended for, we will allow the appellant the full advantage of the objection, by taking all the facts in the bill as the foundation of our opinion. In like manner we forbear to express an opinion upon the propriety of applying to this case the rule, which however, it may be subject to rare exceptions, may certainly be considered a general rule, that where parties have had an opportunity to use a particular state of facts as a defence at law, courts of equity will not relieve upon the ground, that by neglect or accident it was not made use of, or failed on being attempted.

The principle is perfectly settled, that the creditor by making a new agreement with his debtor, inconsistent with the terms of the original agreement, or any alteration in those terms, or in the mode or the time of performing them, without the assent of the surety of such debtor, thereby discharges the surety.

It does not, however, violate the language or the policy of this rule, to allow the creditor to forbear during his pleasure the rigorous prosecution of his demand, and a creditor may accordingly remain inactive, reposing upon the faith of

the security he has taken. The security having become chargeable by a forfeiture of the contract, or its non-performance by the principal, in the manner and at the time agreed upon, may ensure a prompt prosecution, either by discharging the obligation, and becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed by an application to a court of equity. These are his privileges; and if the creditor by transferring a collateral security or fund, by an agreement for extended credit, or an altered mode of performance, puts it out of his power to substitute the surety to all the rights he held, and the means of enforcing them; or assumes an obligation which will restrain his proceeding, when at the instance of the surety, a court of equity shall require it, then the surety must be injured or discharged. The law discharges him.

The bill now before us makes no case for relief, according to the principles stated. It sets forth no agreement with the principal. It states no conditions imposed or attempted to be imposed upon the surety, altering the nature of his engagement, or the mode, or time of performing it, nor does it aver, that there ever was a period when the privilege to pay the debt himself, or to apply to a court of equity would not be successfully employed, to ensure a prompt pursuit of the principal.

The order to the sheriff was as revocable as would have been his order to his attorney to sue, or not to sue, after placing his claim in his hands, and the surety might at any time have paid off the debt, and pursued the property as a substituted plaintiff against the principal. It did not tie up the hands of the creditor. It was no settled agreement—not an obligatory contract. *Orme vs. Young*, 2 *Holls. N. P. Cases*, 84. *Huntt vs. U. States*, 1 *Gallison*, 32. *Theobald*, 80, 81.

The position of the appellant's counsel, that the creditor was bound to discharge the incumbrance, if any, upon the land, is altogether untenable. He was satisfied with the

Sasser vs. Young and Kemp.—1834.

personal responsibility of the appellant. As it was the interest, so it was the duty of a prudent surety to look to that matter. Such a doctrine would compel a creditor to make an advance to improve a security, with which he is abundantly satisfied, for the sole purpose of relieving the surety, from the precise risk he had assumed.

It was also urged, that loss to the security occasioned by the order to return the property unsold, is charged, and relied on in the bill. But it is not sufficient to allege a loss, without imputing it to some act inconsistent with the relations of the parties. Loss may, and often does, occur from delay to prosecute suit, and from delay to execute after judgment. The surety has the privilege of hastening the creditor to avoid this loss, and if he fails to use his privilege, he comes too late, when he asks that the consequences of his neglect shall be visited upon the creditor. The property seized was real property; all the title and interest of the principal was bound by the judgment, and the sheriff could only have sold that interest. The bill discloses nothing which forbids us to suppose, that the same interest may yet be sold. It is then a case of delay, against which the surety made no resistance, not even by a personal request to the creditor, insisting upon a rigorous prosecution, which according to some of the decisions in *New York*, would have availed the surety. 13 *Johns*. 384. 17 *Ib.* 391. We feel bound however to say, that we cannot accord in the doctrine of those cases, not having found them sustained in any decisions, *American* or *English*.

The case is clear of fraud. The bill does not charge it, and in the absence of facts to justify the injunction, we think the order of dissolution correctly passed, and therefore affirm it.

ORDER AFFIRMED.

Byers vs. McClanahan, Jr.—1834.

JOHN BYERS vs. JOHN McCLANAHAN, Jr.—December, 1834.

Upon a bill filed by one joint surety against another for contribution, where the principal obligor and the other sureties are insolvent, it is unnecessary to make them parties for the purpose of contribution.

A signature and seal attached to a blank piece of paper, for the purpose of having a bond thereafter written upon it, will not bind the party as an obligor in such bond: but if a party so signing and sealing, after the bond is filled up, adopts it as his bond, it is sufficient.

Such adoption is a question of fact, to be collected from circumstances; and a subsequent acknowledgment of the signature as his hand writing, to a party making the inquiry, without any intimation that he did not consider himself bound by the bond, would be sufficient proof of such adoption.

Delivery is essential to the legal validity of a deed; but such delivery may be either actual or verbal. It is sufficient that there be an intention, or assent of the mind to treat it as a deed, to clothe it with the attributes of a legal instrument.

Where the defendant becomes joint security with the complainant, at the request of the latter, he is absolved from all responsibility to make contribution in his character of co-surety.

APPEAL from the equity side of *Washington* county court.

The appellee on the 11th of April, 1831, filed his bill on the equity side of *Washington* county court, to compel the appellant as his co-surety, to contribute his proportion of the money paid by the appellee, in discharge of a bond to one *Lane*, in which they, with others, were bound as sureties for *Matthew Lind*.

Upon the pleadings and proofs, which are fully stated in the opinion of this court, the county court (T. BUCHANAN, A. J.) decreed, that the defendant pay to the complainant, one-half of the amount paid by him as one of the sureties of *Lind*, and his costs. From this decree the defendant prosecuted the present appeal.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, DORSEY, and CHAMBERS, J's.

J. J. Merrick and *Anderson*, for the appellant, contended.

1. That a paper signed, and with scrolls attached by way

of seals, and so delivered, the penalty and condition of the bond being subsequently written, is not a valid deed. *Perkins*, 53. 4 *Com. Dig. (Deed A.)* 1 *Ohio Rep.* 368. 1 *Shep. Touch.* 54. *Thomas' Coke*, 274, (note 1.) 2 *Stark. Ev.* 481. 4 *Rand.* 177.

2. That such a paper delivered with authority to fill it up as a bond for \$10,000, but filled up with another and larger sum, is not valid, without a subsequent acknowledgment and delivery.

3. If however the bond was a valid instrument, still the appellant is not responsible to the appellee for contribution, as the obligation was incurred at his instance and request. A surety who induces another to become a co-surety, cannot call on him for contribution. 2 *Esp. N. P. C.* 479. 2 *Stark. Ev.* 102. 12 *Mass. Rep.* 102.

4. All the parties to the bond should have been before the court. 2 *Chit. Eq. Dig.* 1171.

Price, for the appellee.

1. The first and second points present the same question, and that is, whether the bond was legally executed. When the bond was presented to *Byers*, and he acknowledged the signature and seal to be his, he recognized it to be a binding instrument upon him, whether he knew the contents or not. It was a valid acknowledgment and delivery. *Shep. Touch.* 58, (note 2.) *Ib.* 56, 57. 12 *Johns.* 536. A bond signed and sealed with material parts in blank, afterwards filled up, is good. 9 *Cranch*, 36, 37. 4 *Johns. Rep.* 58.

2. There is nothing in the circumstances of this case, which can deprive the appellee of the right to demand contribution. 2 *Bos. and Pul.* 270. *Act 1763, ch. 23, sec. 8.* That part of the answer which alleges that the appellant signed the bond at the request of the appellee, is not responsive to the bill, and consequently must be proved, and there is no evidence of any such request. It is certain that the appellee himself never did speak to the appellant, on the subject of this suretyship; nor did he ever autho-

Byers vs. McClanahan, Jr.—1834.

rise any one in *his name* to make such application to him. The utmost that can be made of the proof is, that he told the principal in the bond, that he might call on the appellant in his, the principal's name, but he certainly never authorised an application to him in his own name, and unless he did so, he is not precluded from calling for contribution. The same degree of persuasion which will deprive a surety of the right to compel contribution from a co-surety, would entitle the latter, if made to pay the money, to a full indemnity to the former. 2 *Esp. N. P. C.* 478. *Theo.* 158. 1 *Law Library*, 1. 8 *Barn. and Cres.* 728. 15. *Serg. and Low.* 333.

3. The other parties to the bond being shown to be insolvent, were not necessary parties to the suit. 16 *Ves.* 326. 3 *Atk.* 406. 1 *Cox.* 275. 3 *Com. Dig.* 374.

STEPHEN, J., delivered the opinion of the court.

This is an appeal from *Washington* county court, sitting as a court of equity. The bill was filed by the appellee, against the appellant, to compel him to contribute his proportion of the money paid by the complainant, to satisfy a bond debt, for the payment of which they were joint sureties, together with certain other persons, for a certain *Matthew Lind*, to a certain *Thomas C. Lane*. The debt was contracted by *Lind*, to *Lane*, for the purchase of a quantity of bank stock. The bill charges the payment of a considerable part of the money by the complainant, and that *Lind*, the principal, and all the other sureties, except the appellant, are insolvent. The bill claims from the appellant, by way of contribution, a moiety of the money paid by the appellee, who resists the demand upon several grounds of defence. He contends in the first place, that he is not liable to contribution, because he never executed the bond as surety, and that the same is not therefore legally obligatory on him. Secondly, that if under the circumstances it is to be considered as his bond, he executed the same, and incurred his liability as surety, at the request of the com-

plainant, who is therefore not legally entitled to call upon him to make contribution. And lastly, that if he is responsible in the character of a co-surety, the complainant is not entitled to recover, because, he has not brought the necessary and proper parties before the court.

The first question is the only one which has created much difficulty in the decision of this case. It is, whether the bond under the circumstances attending its execution, can be considered his deed, and consequently legally binding upon him. When he wrote his name and affixed his seal to the paper, it was at the solicitation of *Lind*, the principal, and with an understanding, that the bond was thereafter to be written upon it, the paper to which his signature and seal were attached being at that time perfectly in blank. In that state it was carried to *Lane*, the obligee, by *Lind*, the principal, who, with the consent of *Lind*, entered the writing obligatory upon it, but refused to accept it, until it had been filled up, and acknowledged by all the obligors as their act and deed. For the purpose of obtaining such acknowledgments, the bond, thus written in full, was placed in the hands of an agent mutually agreed upon by *Lind*, the principal, and *Lane*, the obligee. The agent thus authorised, afterwards presented the bond to the appellant, for the purpose of obtaining his assent and recognition of it, as his act and deed, and whether upon such presentation it received the sanction of the appellant as his bond, or writing obligatory, is the question; for that it was not legally binding upon him, until it received his assent and acknowledgment, after it had been so written in full, there can, we think, be no doubt. The law being well settled by the earliest writers in our legal histories, that a signature and seal attached to a blank piece of paper, for the purpose of having a bond thereafter written upon it, will not bind the party as an obligor in such bond. For the proof of this principle see *Shep. Touch.* 54, where it is said, "every deed well made must be written, i. e. the agreement must be all written before the sealing and delivery of it; for if a man

seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment, that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." To the same effect see 1 *Ohio Rep.* 372, where the court say, "the ancient law was well settled, that a valid deed could not be made by writing it over a signature and seal, made upon a blank or empty sheet of paper." We know of no decision by which this ancient doctrine is overruled.

The cases cited by the plaintiff's counsel are of promissory notes not under seal, and of deeds, where all the material parts were written at the time of making the signature and seal.

Byers in his answer states, that *Lind* called on him with the said paper, stating that he came at the instance of the complainant and *John McClanahan of James*, with their request that he would join them as sureties for the said *Lind*, in a bond to *Lane* for the payment of \$10,000, and not of \$10,500, as the bond was afterwards written, and that he wrote his name and affixed his seal with that understanding; he denies that he ever did acknowledge it as his bond after it was written, but he admits that after the bond was filled up, a certain *James Watson* called on him at the instance of *Lane*, as he stated, and shewed him the said bond, and pointing to his name asked him if that was his hand writing, and he admitted that it was; but he did not read or examine the instrument, nor did he acknowledge it to be his bond, as stated in complainant's bill.

Lind, the principal in the bond, states in his deposition, that the paper was signed and sealed in blank; that the representation made to *Byers* was, that the bond was to be filled with the sum of \$10,000, and that *Byers* signed it under that understanding, as well as he recollects. That the additional sum of five hundred dollars was inserted in the bond, in consequence of *Lane's* having five hundred dollars more coming from the bank, which he wished to have inserted or included. It is proper here to remark,

that if such was the understanding between *Byers* and *Lind*; *Lane*, the obligee, was not a party to such agreement, nor was he under the circumstances of this case bound by it. If *Lind* violated the confidence reposed in him by *Byers*, he alone is responsible for such violation of good faith, and *Lane*, who was a perfect stranger to the contract cannot be affected by it. The proof is, that a blank piece of paper with the signature and seal of *Byers* attached to it, was carried by *Lind* to *Lane*; that *Lane* wrote the bond upon it with the consent of *Lind*, conditioned for the payment of \$10,500; that the bond thus written was at the request of *Lane*, with *Lind*'s acquiescence, carried by *Watson* to *Byers*, for the purpose of getting him to acknowledge it as his bond; and *Watson* proves that *Byers*, when the bond was presented to him, acknowledged his hand and seal, over which the same was written; he swears he cannot recollect whether he acknowledged it as his bond, either in words or substance, nor can he say whether he read it, but he made no objection to it as his bond. He further proves expressly, that *Byers* subsequently told him he knew the contents of the bond when he presented it to him. *Byers* admits in his answer, that *Watson* informed him that he came with the bond at the instance of *Lane*, and that when the bond was presented to him by *Watson*, he acknowledged the signature to be his hand-writing. If he knew, as he admits he did, that *Watson* came to him with the bond, as the agent of *Lane*, for the purpose of getting him to acknowledge his seal and signature, the conclusion was natural and irresistible, that the object of his visit was to get from him such an acknowledgment, as would make the bond legally obligatory upon him. If he did not mean to be bound by his signature and seal, and to consider the bond as valid and binding upon him, it was his duty so to have declared at the time it was presented to him. He must have known the object of *Lane* to have been, to get such an acknowledgment as would make it legally efficient and obligatory; which circumstances, we think, amounted

Byers vs. McClanahan, Jr — 1834.

in legal construction to an adoption of the bond, as his act and deed, and a delivery of it, after it had been signed and sealed, and filled up. It is true, that delivery is essential to the legal validity of a deed; but such delivery may be either actual or verbal, that is, by doing something and saying nothing, or by saying something and doing nothing. *Shep. Touch.* 57.

A deed then, it is clear, may be delivered by words, and no particular form of words is essential for such purpose. It is sufficient that there be an intention, or assent of the mind to treat it as his deed; to clothe it with the attributes of a legal instrument. Can there be a doubt then, that *Byers* meant so to treat it, when he declared to the known agent of *Lane*, that it was his seal and signature, especially when he knew, as he must have known, that the object of *Lane* was to get from him such an acknowledgment as would make it legally obligatory. We think, if such was not his intention, good faith and fair dealing required at his hands an explicit declaration to the contrary. We must therefore come to the conclusion, that the conduct of *Byers* was sufficient to make the bond legally efficient, and to bind him to the performance of all the stipulations contained in it. But it is contended on the part of *Byers*, that if under the circumstances, the bond is to be considered as his act and deed, he is not liable to contribution, because he became the surety of *Lind*, at the request of the complainant. If such was the fact, the legal principle unquestionably is, as contended by him, and that he is absolved from all responsibility to make contribution, in his character of co-surety.

In 1 *Law Lib.* 159, the law is stated to be, "that if one becomes surety at the request of his co-surety, he is not in general liable to the latter for contribution; and consequently it would seem, that in case the creditor obliges him to pay, he is entitled to complete indemnification from the latter." The legal principle being clear and indubitable, his liability depends upon a question of fact, which must be de-

eided by the proof in the cause. The testimony, we think, clearly demonstrates, that he became surety in the bond, not at the request of the complainant, but at the solicitation of *Lind*, the principal. It is true, he states in his answer, that it was at the request of the complainant, that he became a surety in the bond, but this allegation in his answer, not being responsive to the bill, is not evidence in his favor, and is clearly disproved by the testimony of *Lind*, by whom he was applied to for that purpose. The interrogatory propounded to *Lind* upon this subject is in the following words: "Did or did not *John McClanahan, Jr.*, the complainant in this cause, request or desire you to apply to *John Byers*, the defendant, to become one of your sureties, and did you, or did you not, tell the said *Byers*, when you so called upon him, that *John McClanahan, Jr.*, the complainant, requested or desired you to call upon him to become one of your sureties?" To this interrogatory, he answered in the following words: "that it was at the desire of the present plaintiff, and *John McClanahan of James*, that he had applied to *Mr. Byers* to be one of his sureties in the bond, and that he had stated the matter so to said *Byers*. He does not recollect of stating to *Mr. Byers* that it was at the instance of the present plaintiff, any more than of *John McClanahan of James*, that he had called on him for security, for he always considered the latter as having rather the lead in that contrivance." This testimony of *Lind* proves nothing more than that it was at the suggestion of the complainant, that he applied to *Byers* to become one of his sureties; and that he so stated to *Byers*, when the application was made; he did not inform *Byers* that he was authorized by the complainants to make the request in the name of the complainant, but that he, *Lind*, called upon him to become one of his sureties at the instance of the complainant. It is therefore clear beyond controversy, that it was at the request of *Lind* himself, that *Byers* united as surety in the bond, and not at the request or solicitation of the complainant. The true construction of the evidence

Byers vs. McClanahan, Jr.—1834.

establishes nothing more, than that he was moved, or induced by the complainant to make the application in his own name, and not in the name, or at the request, of *John McClanahan, Jr.* The defendant then having failed in establishing this ground of his defence, it only remains to consider the objection of the want of proper parties to the suit. On this part of the case, it is contended by the defendant, that the principal and other sureties in the bond, ought to have been made defendants; and that the omission to make them parties is fatal, and decisive against the complainant's recovery. It is only upon two grounds that it can be contended, they ought to have been parties to the suit, either for the purpose of assisting in taking the account, or of making contribution towards the complainant's indemnity. In this part of his defence, we think the defendant has also failed. The evidence proves most satisfactorily, that it was wholly unnecessary to make them parties for either of those purposes.

It is fully established by the testimony in the cause, that at the time the bill was filed, both principal and sureties were entirely insolvent, and unable to contribute in the smallest degree to the complainant's reimbursement. To this fact, the testimony adduced is full and ample; the making them parties therefore, for the purpose of contribution, would have been an act wholly nugatory and unavailing. It was, we think, equally unnecessary to make them parties for the purpose of assisting in taking the account, because all the payments which were made by any of the parties, are proved by the attorney into whose hands the bond was placed, for the purpose of bringing suit upon it; and there is therefore not the slightest reason to believe, that any benefit would have resulted from inserting them in the bill as parties, in relation to the taking of the account. In 3 *Atkins*. 406, 407, the lord Chancellor says, "the general rule of the court to be sure is, where a debt is joint and several, the plaintiff must bring each of the debtors before the courts, because they are entitled to the assistance of each other in

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

taking the account; another reason is, that the debtors are entitled to a contribution, where one pays more than his share of the debt." As to taking of the account, it is quite out of the case, by the admission of the defendants, that the bond is not paid, nor any part of the principal and interest; so that here is no ground to make the representative of *Watson* a party, in order to assist him in taking the account. The other pretence is in order for a contribution. It is admitted by all the answers, that *Watson* is dead insolvent, and therefore differs from the case of *Ashurst vs. Eyre*, determined before me upon a plea. For though there was an admission of insolvency in that case, yet it did not appear whether the principal or interest might not have been paid by the co-obligor, who was not before the court, and that was the reason of allowing the plea. These principles, which received the sanction of that distinguished Chancellor, *Ld. Hardwicke*, clearly shew, that the objection raised for want of parties, cannot be sustained; and in every view which we have taken of this case, we think the decree of the court below was correct, and that the same ought to be affirmed.

DECREE AFFIRMED WITH COSTS.

LEWIS, USE OF RINGGOLD'S ADM'R, vs. HOBLITZELL'S ADMR'S, AND HOBLITZELL'S ADM'RS vs. LEWIS, USE OF RINGGOLD'S ADM'R.—*December, 1834.*

The bonds of G, payable in 1823-4 and 5, were assigned by A the obligee, to H, who assigned them on the 2d May, 1820, to L, in the following terms: "For value received I assign to L, his heirs and assigns, the within bond, and hold myself answerable for the ultimate payment." These bonds were afterwards assigned by L to R. HELD, that in the event of L's diligent prosecution against those who stood before H, in the order of liability, upon those bonds, or by shewing the inutility of such a prosecution, he be-

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

came entitled to a right of action against H, upon his contract of indemnity, and that suit might be brought against him for the use of R, the equitable assignee of L. But *quere*, although it was indispensable to proceed against G, the obligor, or account for not doing it, whether it was necessary to proceed against *all* the antecedent parties to H.

In an action against the assignor of certain bonds, to shew the inutility of proceeding against the obligor, the bonds being payable in 1823-4 and 5, the certificate of the clerk of the proper court, "that it appears on the docket of August court, 1824, that the obligor had a personal release under the insolvent laws of the State; and that he again applied for the benefit of the insolvent laws of the State on the 13th March, 1830; that his day for appearance was on the second Monday of December, 1830, and by his schedule has made return of no property except what is taken under a distress for rent," is not sufficient upon a case stated, to enable the court to assume the inability of the obligor's estate, in the years 1824-5-6, and to the institution of the suit in 1829, to pay the claim, if he had been sued: although it might have been sufficient to induce a jury to find the fact of the insolvency.

In a case stated, the parties ought to agree upon and state the facts, and not the evidence of the facts; if all the facts upon which the law is claimed cannot be agreed, a jury should be called.

CROSS APPEALS from *Alleghany* county court.

This was an action of *Assumpsit*, instituted on the 25th of August, 1829, by the appellant in the first case, against *Hoblitzell* in his life-time, to charge him as the assignor of two bonds for \$1000 each, payable respectively on the 1st of April, 1824, and 1825.

Issues were joined upon the pleas of *non assumpsit* and limitations; and a verdict taken for the plaintiff, subject to the opinion of the court upon the following case stated.

"On the 30th of December, 1818, *Robert G. Russell* purchased a house and lot of ground in *Bedford, Pennsylvania*, from one *John Anderson*, for \$7000—\$1000, part thereof was paid in cash; and the balance to be paid in six equal annual payments, commencing on the first of April, 1820, for which he gave six several bonds secured by mortgage on the premises. That on the 20th day of January, 1820, the said *John Anderson* assigned the aforesaid bonds to *Jacob Hoblitzell*, (the appellee's intestate) in his life-time, for

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

a full and valuable consideration, and at the same time, and as a simultaneous act, assigned him the mortgage to secure the payment of the bonds. That on the 2d of May, 1820, two of the said bonds, and on the 22d May of the same year, one other of the said bonds, were assigned by said *Hoblitzell* to *Henry Lewis*, (the appellant) for a full and valuable consideration, in the terms following: "For value received I assign to *Henry Lewis*, his heirs and assigns, the within bond, and hold myself answerable for the ultimate payment. May 2d, 1820."

That on the 17th of February, 1821, three of the bonds payable in 1823-4 and 5, were assigned by said *Lewis* to *Samuel Ringgold*, (for the use of whose administrator the present action is brought.) The plaintiff further proved, that on the 18th of April, 1823, suit was instituted in the *Alleghany* county court, in the name of said *Lewis* for the use of *Ringgold*, against *Hoblitzell*, as the assignor of the bond which became due on the 1st of April, 1823, in which suit there was a verdict and judgment for the defendant, at the October term of that court in the year 1824. That on the third day of September, 1823, suit was instituted in *Frederick* county court, on the same bond, in the name of *Anderson*, the obligee, for the use of *Ringgold*, against *Russell*, the obligor, who confessed judgment therefor, on the 3d of August, 1824, and that nothing was ever received from the said *Russell*, on either of the said bonds, except the sum of \$1669 63, from the sale of the mortgaged premises in *Bedford*. That *Isaac S. Swearingen*, to whom *Ringgold's* proportion of the proceeds of the mortgaged premises was paid, was his agent in the collection of the money due on the said bonds, and as such agent, he caused the suits to be instituted in *Alleghany* county court against *Hoblitzell*. That he then went to *Pennsylvania* to proceed on the mortgage, one of the said bonds being then either lost or mislaid, and that he afterwards got that bond from *Franklin Anderson*. That he employed counsel in *Bedford*, with directions to proceed as fast as possible in the

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

business, it being his desire to obtain all the money from *Anderson*, rather than resort to *Hoblitzell*. That *Anderson* was solvent in 1828, and that no other suit or suits were at any time instituted against him on his assignment of the aforesaid bonds, or mortgage, and no other suit was brought against said *Russell*, except that already mentioned in *Fredrick* county court.

The plaintiff also offered in evidence the following certificate. "I hereby certify that it appears on the docket of August court, 1823, that *Robert G. Russell* has had a personal release, under the insolvent laws of this State, and on the 13th March, 1830. That his day for appearance was on the second Monday of December, 1830, and by his schedule has made return of no property, except what is in the constable's hands, taken under distress for rent.

Test, *John Schley*, Clerk."

Upon this statement the county court gave judgment for the plaintiff, for the amount found due by the jury, deducting the sum received by the plaintiff from the proceeds of the mortgaged premises in *Pennsylvania*.

Both parties appealed to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J.

Dixon and *Johnson*, for *Hoblitzell's Admr's*, contended, 1. That the plaintiff is not entitled to recover, in consequence of his neglect to proceed against *Russell*. Unless due diligence was used to recover the money from *Russell*, the principal debtor, the secondary liability of *Hoblitzell* did not attach. His engagement was not absolute, but conditional. It was a contract of indemnity, to save harmless, and no more; and he could only be held responsible, upon the insufficiency of the means of the principal to pay the debt, being ascertained by a diligent prosecution of every legal remedy against him. Act 1763, ch. 23, sec. 9. 3 *Harr. and Johns*. 235. The obtention by *Russell* of a personal dis-

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

charge is not evidence of insolvency. A party who has been discharged is not a competent witness for his trustee, because of his interest in the surplus of his estate, and of course the law presumes there may be a surplus.

The assignor of a bond is only answerable when the exercise of due diligence has failed to recover the money from the principal debtor, and the *onus* of the proof is upon the plaintiff. 2 *Hen. and Munf.* 114. (note.) 16 *Serg. and Lowb.* 29. This suit is upon the assignment of the bonds which fell due in 1824 and 1825, and upon them suits were never brought against the obligor, and no fact is stated, which furnishes a legal excuse for not doing so.

2. The money should have been recovered from *Anderson*, the obligee, against whom a suit might have been instituted in the name of *Hoblitzell*, for the use of *Lewis*. It was a *Pennsylvania* contract, and consequently it is no answer to say, that the plaintiff is excused from proceeding against him because he resided in that State.

This cause comes before the court upon a case stated, and no inferences of fact are to be made but such as are inevitable. 2 *Harr. and Gill*, 119, 320. 3 *Gill and Johns*. 158.

On the appeal of *Lewis* they insisted, that the verdict was conclusive upon the question of the application of payments.

Price, for Lewis.

On the bond which became due in April, 1823, suit was instituted to the first term thereafter against *Russell*, soon after which he petitioned for the benefit of the insolvent laws, and obtained a personal discharge. And he petitioned again in 1830, having no property which could be made liable for this debt. A suit therefore would have been fruitless, and need not have been brought. The inability to pay a debt, is a matter to be inferred from circumstances, and need not be expressly proved. The plaintiff had already sued *Russell*, on the bond of 1823, and recovered a judgment, from which nothing could be realized; why then

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

should they encounter the expense and trouble of securing the others.

2. Proceedings against *Anderson* were not necessary to fix the liability of *Hoblitzell*. The assignment by *Anderson* to *Hoblitzell*, was a naked assignment, and created no liability from the former to the latter, but if it did, there could be no obligation on *Lewis* to go to *Pennsylvania* in pursuit of him. The cases in *Virginia*, upon the subject of the responsibility of the assignor to the assignee, were decided upon the principle of treating sealed notes, as negotiable instruments. 3 *Gill and Johns*. 242. There was no obligation on *Ringgold* to go to *Pennsylvania* to proceed upon the mortgage, though he had a *right* to do so if he chose. The money received by him there from the proceeds of the mortgaged premises, he had a right to apply to the debt most in jeopardy, and that was the bond of 1823. 6 *Cranch*, 27, 28. 5 *Taunt*. 601. 1 *Serg. and Low*. 203. And besides, as that bond first became payable, it should have been first paid. 1 *Bay*. 497.

CHAMBERS, J., delivered the opinion of the court.

It is clear that the assignment of *Hoblitzell* to *Lewis*, by the express terms of which, he made himself responsible for the ultimate payment of the debt assigned, would subject *Hoblitzell* to an action at the suit of *Lewis*, in the event of *Lewis'* diligent prosecution against those who stood before *Hoblitzell* in the order of liability, or by showing an excuse for, or in other words, the inutility of such prosecution.

We think that *Ringgold*, being in point of fact the equitable assignee of *Lewis*, the suit might well be instituted in the name of *Lewis* for his use. Much argument has been urged on one hand to sustain, and on the other to resist the proposition, that the obligation of *Hoblitzell* did not arise until an effort had been made to enforce the demand against *Anderson*, as well as against the mortgaged premises. Upon this proposition it will be unnecessary for us to

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

express an opinion, as our decision will be given upon grounds not involving its justness.

It cannot be controverted, that before the liability of *Hoblitzell* could accrue, it was necessary to use due diligence against *Russell*, or to account for the want of it, by proof of his entire inability to pay.

That no suit has been instituted against him on these bonds is admitted, and therefore due diligence is disclaimed; but it is said, that "facts and circumstances" set forth in the case stated, prove an excuse, by shewing his inability to pay. The parts of the record to which we are referred, and in which alone, any thing can be found, having any reference to this subject, are *first*, the certificate of the clerk of *Frederick* county court, in these words: "I hereby certify that it appears on the docket of August court, 1824, that *Robert G. Russell*, has had a personal release under the insolvent laws of this State, and that he again applied for the benefit of the insolvent laws of this State, on the 13th of March, 1830. That his day for appearance is on the second Monday of December, 1830, and by his schedule, has made return of no property, except what is in the constable's hands, taken under distress for rent. Test, *John Schley*, Clerk."

Next, the statement of *Swearingen's* proceedings as agent of *Ringgold*, the assignee, who "caused a suit to be instituted in 1823, in *Alleghany* county, against *Hoblitzell*," which was an action upon the assignment of another bond, and in which action the plaintiff was non-suited; and another suit in *Frederick* county against *Russell*, in 1823, which was an action upon another bond, and upon which bond judgment was obtained, and no proceeding by execution issued—"And went to *Bedford, Pennsylvania*, and employed counsel to proceed on the mortgage, and against *Anderson*. That he resorted to all the efforts aforesaid, wishing to obtain all the money from *Anderson*, rather than resort to *Hoblitzell*; and that he directed his lawyers to proceed as fast as possible in the business aforesaid," which we are

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

asked to connect with a prior part of the case stated. "That nothing was ever received from said *Russell*, on either of said bonds, except from the sale of the mortgaged premises in *Bedford*."

We have no means of determining the date of the clerk's certificate, except that it speaks of the application in March, 1830, in the past tense, and not so of the day for appearing in *December*, nor is the purpose avowed for which it was introduced. We are also left to conjecture to which of the two applications it intends to attach the "schedule" spoken of. It would seem to be a part of the proceedings of 1830, as the certificate says, the property returned thereby "is" in the hands of the constable. The certificate therefore proves nothing in regard to the property held by *Russell*, when the "personal discharge" was obtained, nor does it deny that he returned a schedule, or if any, to what amount. He might have had ample estate to pay all his debts in the year 1824, 1825, and 1826, and to the institution of this suit, and it might have appeared even on the face of his schedule, returned when he obtained the personal release, that he had large and ample funds, and yet every word in the certificate be literally true.

The proceedings of *Swearingen*, the agent, and every thing stated in regard to them, are as inconclusive as the certificate, and the history of his acts and directions may be strictly given in the statement, and yet leave it entirely possible that *Russell* was solvent, and the additional fact that nothing was received from *Russell*, does not supply the chasm, or constitute the conclusive proof of inability to pay on the part of *Russell*, which alone can avail the party, in a special verdict or case stated. The circumstances might probably have induced a jury to infer the insolvency of *Russell*, although we cannot but think it would have been prudent to aid them by some little evidence from individuals, who residing in the vicinity and acquainted with his pecuniary condition, might speak to the fact of his having property, in terms at least as satisfactory as these "circumstances" do.

Lewis, use of Ringgold's Adm'r, vs. Hoblitzell's Adm'r.—1834.

The cases in this court are full in regard to this matter. In *Reeside vs. Fisher*, 2 *Harr. and Johns*, 320, the *Replevin* was issued and served on the 4th of March, 1824. The defendant justified as deputy *Marshall* under a seizure made in virtue of a *fieri facias*, which issued on the 18th of December, 1823, and was returnable on the first Tuesday of March, 1824. These facts appeared in a case stated, and the court would not *infer* that the property thus seized, remained in the defendant's hands, as deputy *Marshall*, the case stated, not expressly asserting it; because it might be that the goods had been sold, and left in the defendant's hands by the purchaser, or that the debt had been paid, and the goods permitted to remain by the owner, consistently with any thing appearing on the statement. In *Hysinger vs. Baltzell*, 3 *Gill and Johns*. 158, the court would have imputed *laches*, if it had been alleged in the case stated, "that the defendant was in *Baltimore* for two days, and that the plaintiffs *knew* he was there for that space of time," but it being only stated, that the defendant was in *Baltimore*, purchased goods from the plaintiffs, and remained there two days, the court thought it consistent with the statement, that the purchase of goods might have been immediately before the defendant left *Baltimore*, and therefore without enabling the plaintiffs to sue out a writ with effect, the omission to do which, was charged as *laches*.

The pervading error in the case at bar is, that the "evidence of facts," is set out instead of the facts themselves. The statement furnishes little else but evidence. If all the facts upon which the law is claimed, cannot be agreed, a jury should be called. As the judgment of the county court should have been for the defendants on the facts as stated, and cannot be complained of by the plaintiff, but is erroneous as to the defendant below, *we affirm the judgment on the appeal of Lewis use of Ringgold's Adm'r, and reverse it, and order a PROCEDENDO in the case in which Hoblitzell's Adm's are the appellants.*

Kilgour vs. Miles and Goldsmith.—1834.

JOHN KILGOUR vs. RICHARD H. MILES, and JOHN M. GOLDSMITH.—*December, 1834.*

Upon a contract to deliver merchandize at a future day, if the day mentioned be in fact Sunday, in analogy to the usage in other commercial cases, the day of delivery, according to the legal effect of the contract, is Saturday.

In pleading upon such a contract in an action brought to recover damages for a failure to deliver, the plaintiff having agreed to pay the price of the article contracted for on its delivery, he must aver his readiness to pay at the time and place, when and where, by the legal construction of the contract the delivery was to be made.

The "Sabbath," "the Lord's day," and "Sunday," mean the same day in all Christian communities, and includes the twenty-four hours next ensuing the midnight of Saturday.

It is the duty of the court to notice the days of the week on which particular days of the month fall.

Upon demurrer the court looks for the first defect in the pleadings.

This court does not award a *procedendo* when the judgment of the county court against the plaintiff for a defective declaration upon demurrer, is affirmed.

APPEAL from *St. Mary's* county court.

This was an action of *Covenant*, brought by the appellant against the appellees, on the 12th of July, 1832, on the following contract, under the hands and seals of the parties.

"We, *John M. Goldsmith*, and *Richard H. Miles*, promise and oblige ourselves to deliver to *John Kilgour*, or his agent in *Baltimore*, on the first day of July next, three thousand bushels of good merchantable corn; and he, the said *Kilgour*, promises and obliges himself, his heirs and assigns, to pay for the same forty-five cents per bushel, on the delivery of the above corn. May 11th, 1832."

The plaintiff in his declaration averred, that he "was ready and willing to accept and receive the said corn at the rate or price aforesaid, at the time and place aforesaid, specified in the said articles of agreement, that is to say, at the city of *Baltimore*, on the first day of July, 1832, and was likewise at the time and place specified in the said articles of agreement, ready and prepared to pay for the said corn upon its

Kilgour vs. Miles and Goldsmith.—1834.

delivery the rate or price, so as aforesaid agreed upon, in the said articles of agreement, to wit, the sum of forty-five cents per bushel; yet the said defendants not regarding," &c.

The defendants pleaded "that they had the said corn ready to be delivered, according to the said agreement, but that they could not perform the same because it would have been against the laws of the land for them to do so, inasmuch as the 1st day of July, named as the day of performance thereof, was a Sabbath day, and this they are ready to verify"—wherefore they pray judgment, &c.

There was a general demurrer and joinder in demurrer to the plea; which the county court ruled good, and gave judgment for the defendants. The plaintiff thereupon brought the record by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and DORSEY, and CHAMBERS, J's.

John M. S. Causin, for the appellant.

1. The plea is contradictory, double, and uncertain. The *same* plea cannot present inconsistent defences, though different pleas may. 4 *Term. Rep.* 194.

In the commencement of the plea in this case the validity of the contract is admitted, and an excuse for its non-performance relied upon; whilst the conclusion avoids it altogether. 6 *Com. Dig.* 132.

This plea is so framed as to leave the court in doubt whether the defendants rely upon an excuse for their failure to perform the contract; or whether they assail its validity altogether; and this uncertainty renders it bad on demurrer. 3 *Durn. and East.* 185. 1 *Com. Dig.* 141. 2 *Johns. Cas.* 312. A plea susceptible of two intendments shall be taken most strongly against the party pleading it. 1 *Chitty's Pl.* 463.

The averment that the day was a "Sabbath," does not necessarily mean that it was Sunday. The original and

true meaning of Sabbath is a day of rest merely, and not a day consecrated to religious exercises.

2. A covenant will be enforced against its letter in obedience to its spirit. 1 *Esp.* 118.

If the contract in this case could not be performed on the day stipulated, it should have been performed on the day before or after; that is, Saturday or Monday. 2 *Con. Rep.* 69. And the defendant should have tendered the corn on one of those days; and his plea should have been shaped accordingly. Every circumstance constituting the excuse should have been averred. This plea merely excuses a literal, but not a substantial performance of the contract. The validity of the contract itself cannot be questioned, because it was not *intended* that it should be performed on Sunday. That was an event wholly unanticipated by the parties, and cannot consequently impair their contract.

Under the act of 1823, the facts disclosed by the plea cannot destroy the obligation of the contract, though they may suspend the performance. 2 *Con. Rep.* 74, 75. 5 *Bac. Abr.* (*Tender H. 2.*) 8 *Serg. and Low.* 230. *Chitty on Bills*, 260. 4 *East.* 501. 5 *East.* 265.

Johnson, for the appellees.

The covenants of this contract are mutual, and neither can sue the other without performance, or excuse for the non-performance on his part; and the plaintiff by his pleadings must show such performance or excuse. *Chitty Pl.* 310, 375, 278, (*New Ed.*) In the present case the plaintiff does not aver a performance, or readiness to perform, according to the *legal effect* of the contract, but according to its express stipulations; that is, on the *very day* mentioned in the contract. The question then is, does the declaration allege such a readiness to perform as the law will sanction and recognize; for if it does not, the result is the same, as if such averment had been wholly omitted; and then, undoubtedly, it would be bad on demurrer. 6 *Harr. and Johns.* 401. It was incumbent on the plaintiff to aver in his declaration a readi-

ness to perform his contract, either on the day preceding, or succeeding that named; and also, why he was not ready to perform on the day stipulated, and in the absence of such averments he cannot recover.

The plea has been charged with duplicity, and with having an improper conclusion; but if this be so, it can only be reached by a special demurrer. When a plea contains matter in bar, the court will give the proper judgment without regard to the conclusion.

In this case, there is no averment in the declaration of a readiness to perform, according to the tenor and effect of the contract; which distinguishes it from the case referred to in *Serg. and Low.*, where the averment was of a presentation, according to the tenor and effect of the bill; and besides, this being an action or a covenant, an averment of performance or an excuse was indispensable.

McMahon, in reply.

The covenants are distinct and independent, and not concurrent, and consequently performance or excuse need not be averred. *Arch. Pl.* 100. 10 *Johns.* 90.

The breach assigned in the declaration, is a breach of the entire contract, including time and place; and the plea only responds as to time, and is therefore no answer to the declaration. Under the breach as assigned, the plaintiff might have recovered by showing a readiness to perform on a different day, from the day mentioned in the declaration; there being no distinction in regard to time, between a sealed and an unsealed contract. In declaring on either, when the allegation is under a *scilicet*, the party is not bound to prove the averment strictly, if there are other words from which a different allegation may be inferred. In such case the court will assign the time, according to the legal effect of the contract. 8 *Serg. and Low.* 230. *Chitty on Bills*, 246, 360. The parties to this contract live in *St. Mary's* county, while it was to have been performed in *Baltimore*; and there the plea should have shown

the defendant to have been prepared to perform it on his part, and that he was prevented by the intervention of the Sabbath. The plea should have averred a readiness in *Baltimore*, at the time mentioned in the contract. This averment would certainly have been necessary, if the present defendants were plaintiffs suing for the purchase money, and there is no reason why the same strictness should not be required in a plea.

2. But the plea does not show that the day was the Sunday, or Lord's day, mentioned in the act of assembly, which being a *penal* act, must be rigidly construed.

The term Sabbath, does not necessarily, and *ex vi termini*, mean Sunday. It is a generic term, and means a day of rest, applicable to all nations, and every denomination of persons, Christians or Jews. It has no peculiar meaning, and would not be good in an indictment for violating the Sunday. If, however, the words Sabbath and Sunday have the same signification, still he insisted it meant the *solar* day, and the contract might have been performed before sunrise, or after sundown. 2 *Con. Rep.* 547. 2 *Strange*, 902. 3 *Burr.* 1595. 1 *Taunt.* 135. 10 *Mass.* 317. 13 *Mass.* 345. 8 *Cowen*, 67.

The true time for the performance of this contract was the Saturday preceding; but the plea by alleging a readiness to perform on Sunday, admits a want of readiness on Saturday. 4 *East.* 501. 5 *East.* 265.

A defective declaration may be aided by the admissions of the plea. *Gold on Pl.* 166.

CHAMBERS, J., delivered the opinion of the court.

The demurrer obliges the court to look for the first defect in the pleadings, and we think it is to be found in the declaration.

By the letter of the contract, the first day of July was appointed for the delivery of the corn, but that day happening to fall on Sunday, and the law prohibiting the delivery on Sunday, although it does not annul the contract,

it follows, that the execution of the contract was due on another day, and the delivery on that other day could be enforced. The failure to deliver on Sunday was no violation of the contract, according to its legal interpretation. There was no more obligation upon the party to execute the contract on Sunday, than there was on a day prior to the date of the contract. Let us suppose then, that the declaration had charged a breach of the contract, in the non-delivery of the article sold on some day prior to the date of the covenant, and confining the breach exclusively to such day; would it not be bad on demurrer, and why? Certainly it would, because the covenant of which profert is made, shews that the plaintiff had no claim to damages for the act complained of, that act not being at all in violation of the contract set forth.

Now, this declaration claims damages expressly and exclusively for the non-delivery on Sunday.

There are no words that allege or import a failure to deliver on any other day, and this most important particular differs this case from that in 8 *Serg. and Low*. There the presentment of the bill was alleged to have been made, "according to the tenor and effect thereof," and the *videlicet* being struck out, there remained an averment of the fact. Here there is no averment of the non-delivery according to the tenor and effect of the contract, nor any other but specific averment of a non-delivery on the first day of July, which was on Sunday.

The covenant to pay the stipulated price is a mutual covenant, and it was therefore incumbent on the plaintiff, to aver in his declaration a readiness to pay at the time and place, when and where, by the legal construction of the contract the delivery was to be made. 1 *Ch. Pl.* 278. 1 *East. Rep.* 203. *West vs. Emmons*, 5 *Johns. Rep.* 179. *Porter vs. Rose*, 12 *Johns.* 209.

The allegation of readiness to pay, is made solely in reference to Sunday, and the same remarks precisely apply

to this necessary averment, as we have before made in respect to the assignment of the breach.

The efforts of the counsel to escape from these obvious difficulties, by taking a distinction between the "Sabbath" (as the day is described in the plea) and the "Lord's day," as mentioned in the act of Assembly, or "Sunday," cannot avail. The Sabbath is emphatically *the day* of rest, and the day of rest here is the "Lord's day" or christian's Sunday. Ours is a christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the twenty-four hours next ensuing the midnight of Saturday. But without relying on the plea for the appropriate appellation of the day, or for any other aid, we think there is no difficulty, and the defendant might safely have demurred according to the doctrine of the case of *Hoyle vs. Ld. Cornwallis*, reported at large in *Strange*, 387, and the authority of which has never been disturbed we believe by any later decision.

That case recognizes it as the duty of the court, to notice the days of the week on which particular days of the month fall.

We have found much difficulty in determining whether the legal effect of the contract required its execution on Saturday or Monday. We have no statute or *Maryland* decision to guide us, and in the case in *2 Con. Rep.* the only one produced, we find a great diversity of opinion amongst the judges. In the commercial community, as is admitted in the argument, the usage is established. In bank transactions, drafts, bills of exchange, and negotiable paper, amongst mercantile men, the pecuniary engagements becoming due on Sunday, according to the letter of the agreements, are discharged on the previous Saturday, and we think, that both analogy and convenience will be consulted, by deciding that the same rule shall govern other cases.

JUDGMENT AFFIRMED.

The appellant's counsel afterwards, at the same term, moved the court for a procedendo, but the motion was overruled.

PATRICK DOUGHERTY vs. BERNARD MCCOLGAN.—
December, 1834.

Where there was a loan of money, and a mortgage given on the 13th May, 1828, as a collateral security for the repayment of it; and on the 7th of November, 1828, an absolute deed for the same property was given by the borrower to the lender, who executed a bond for the reconveyance of the same property at the expiration of twelve months, upon the payment of the same sum of money for which the original mortgage was given as collateral security, a court of equity will determine from the facts and circumstances connected with the course of dealing between the parties, whether a conditional sale or mortgage was intended in fact by the parties.

A transaction constituting a mortgage cannot be converted into a sale; therefore the leaning of courts of equity in doubtful cases is against the lenders of money, and they hold such cases rather to be mortgages than conditional sales.

Whenever the intention is to take a security for a subsisting debt, or for money lent, and to avoid or restrict the equity of redemption, Chancery seeking to protect the debtor against the rapacity of the creditor, and to do full and equal justice between the parties, will defeat such intention, by treating the transaction as a mortgage.

A covenant to pay the debt or to repay the money lent, is not an indispensable ingredient in a mortgage. If a security for the money is intended, that security is a mortgage, though not bearing upon its face the form of a mortgage.

When the relation of mortgagor and mortgagee is once established, though the equity of redemption may be sold or disposed of to the mortgagee, yet unless the transaction appears to be fair, and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor.

It is a general principle in Chancery, though not without exceptions, that a mortgagee in possession, is not to be allowed for new improvements erected upon the premises.

A mortgagee before foreclosure is not the substantial owner, nor under any obligation to make any repairs, but such as may be necessary.

Where the property mortgaged exceeded in value the sum lent, and where there was no proof that it had begun to fall into decay; where there was no proof the houses upon the premises were in a ruinous state, and that the mortgagee pulled them down and built new ones as substitutes; where there was no long continued possession, and acts of ownership by a mortgagee, and acquiescence by the mortgagor, with no claim of the right to redeem; where the mortgage was executed and the improvements commenced about three years after, and not finished when a bill to redeem was

Dougherty vs. McColgan.—1834.

filed, and where the mortgagor during the whole term kept up a continual claim of the right to redeem, and had no notice of the design to put up new improvements, IT WAS HELD, upon a bill to redeem, that the mortgagee could not claim to be paid for new buildings, which he had erected upon the mortgaged premises, but must surrender the property upon the payment of his debt and interest.

APPEAL from the court of Chancery.

The appellant on the 7th of March, 1832, filed his bill against the appellee, alleging that being indebted to the appellee in the sum of \$500, for the purpose of securing the payment of the same, he conveyed to him on the 7th of November, 1828, by a deed absolute upon its face, certain leasehold property in the city of *Baltimore*, and at the same time, took from the appellee a bond conditioned for the re-conveyance of the property, upon the payment of the said sum of money, at the expiration of twelve months from the date thereof. That the appellee entered into, and has remained in possession of the property from the date of the deed, receiving to his own use the rents and profits, and notwithstanding the appellant has offered to repay him the \$500, refuses to re-convey, agreeably to the condition of his bond, denying the appellant's right of redemption, and asserting an indefeasible title in himself. The prayer of the bill is, for an account and re-conveyance, upon the payment by the appellant of whatever sum may be found due from him to the appellee, and for general relief.

The answer admitted the execution of the deed, and defeasance, as charged in the bill, but alleged that after the expiration of the period limited for the payment of the money, which was originally loaned on the 13th of May, 1828, on mortgage of said property; the appellant not being able to pay the debt, the time for doing so was by agreement of parties extended for three months, with the understanding, and it was so agreed, that should the appellant fail in the payment at that time, the conveyance to the appellee, notwithstanding the defeasance, should become absolute. That the respondent remained in the undisturbed possession

of the premises, from the date of the deed to the time of filing the present bill, without any demand or claim being made upon him in any shape, and that he had at that period just erected and completed new improvements thereon, at an expense of \$720, which, together with taxes, insurance, ground rent, &c. and the interest for three years on the \$500, make an aggregate of \$1458 78, which the said property has cost him, whilst the total of the rents received by him is but \$217 74. And the respondent submits, that no decree in the premises should pass, without the re-payment, or securing to him the re-payment of the amount due, in the event of a sale for less than the sum so owing to him as aforesaid.

After the return of a commission, under which several witnesses were examined, the Chancellor (BLAND,) on the 9th of September, 1833, decreed, that the parties account with each other before the auditor, concerning the mortgage debt, the rents and profits, and the value of the permanent improvements; being of opinion that the complainant could only be permitted to redeem, upon paying for the lasting improvements made upon the property, under all the peculiar facts and circumstances of the case. From this decree the complainant prosecuted an appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

McMahon, for the appellant.

When a deed and defeasance are executed on the same day, they constitute a mortgage, as does every transaction, no matter what shape it may assume, whose object is to secure the re-payment of money, or the re-imbusement of a pre-existing debt; and the question therefore is, shall a mortgagee, whose possession has not been of long duration, be allowed for new improvements, not essential to the beneficial enjoyment of the property, and whilst the mortgagor continued to assert his equity of redemption. 1 *Powel*, 4.

Dougherty vs. McColgan.—1834.

(a, note 2.) *Ib.* 120, (note 1.) A mortgagee cannot create an incumbrance on the property, binding the rights of the mortgagor, and every accessorial advantage is for the benefit of the mortgagor, except so far as it enhances the security of the mortgagee. A mortgagee is not entitled to be re-imbursed for his personal attention. 1 *Powel on Mort.* 295, (B.) Nor is he allowed for the expense of insurance. 5 *Pick.* 270. 1 *Hop. Ch. Rep.* 283. Neither is he allowed for repairs to pre-existing buildings, unless such repairs are necessary. 4 *Ves.* 480. 1 *Powel*, 189, (A,) 196. 5 *Pick.* 270. New buildings for new purposes cannot be made, nor expenses not necessary incurred. 1 *Johns. Ch. Rep.* 387. 2 *Pick.* 505. 12 *Ves.* 493. 3 *Pow.* 957, (note A.) If by the decree of the court of Chancery, a mortgagor is let into possession of the premises before the time stipulated in the contract, then, in that case, the mortgagee will be allowed for improvements; because when made, he had a right to anticipate the enjoyment of the property, until the expiration of the stipulated period, and if he is deprived by decree of that advantage, it is but equitable that he should be reimbursed for his improvements. 1 *Vern.* 183. 7 *Con. Rep.* 377, 384. 2 *Sch. and Lef.* 661. 1 *Powel*, 374.

It may be contended that this is a conditional sale, and not a mortgage; but that question is not before this court. The decree of the Chancellor treated it as a mortgage, and the defendant has not appealed; and for the same reason, it cannot be objected, that the bill does not make a tender of the money. That the transaction in its origin was a mortgage cannot be questioned; and an agreement formed at the time, or subsequently entered into, restraining the right of redemption would not be valid. 1 *Powel*, 124, (A.) *Ib.* 120. (note.) An equity of redemption it is true may be sold, but it must be for a valuable consideration, which was not the case in reference to the agreement here, relied on as an abandonment of the right to redeem. 5 *Gill and Johns.* 75.

Frick, for the appellee.

1. The agreement to extend the time of payment for three months, converted the mortgage into a conditional sale.

2. But if that was not the case, still under the circumstances of this case, the mortgagee should be allowed for the permanent improvements. The possession by the mortgagee was not taken under the mortgage of May, 1828, but under the deed of November following, and the improvements were not made until after the appellee supposed his title to be indefeasible. He supposed himself the actual owner of the property, and the error, if it was an error, was an honest one, for which he should not be made to suffer. 5 *Gill and Johns*. 75. Besides the mortgagor stood by, and saw those improvements made, and then to be allowed to redeem merely upon the payment of the original debt, when by a timely objection he could have saved the mortgagee the cost of the improvements, would be a fraud upon him which no court will tolerate. 5 *Harr. and Johns*. 147. 6 *Peters*. 716. 2 *Harr. and Gill*. 191.

The cases referred to on the other side, are cases of clear unequivocal mortgage, in which the right to redeem was indisputable. 1 *Johns. Ch. Rep.* 387. 3 *Powl.* 957, (A.) 5 *Harr. and Johns*. 312, 313. 1 *Wash. Rep.* 14. 1 *Vern.* 137. 7 *Cranch.* 240.

3. But at all events the mortgagor was bound to have tendered the money, and the tender should have been contained in the bill. 6 *Harr. and Johns*. 100, 134.

BUCHANAN, Ch. J., delivered the opinion of the court.

The complainant in his bill treats the deed to the defendant as a mortgage, and seeks to redeem the premises on payment of such sum as may be justly due thereon, which is denied by the decree of the Chancellor, except on his paying also for the permanent improvements, erected upon the property by the defendant.

It appears that originally, on the 13th of May, 1828, the

Dougherty vs. McColgan.—1834.

defendant lent, or advanced to the complainant, five hundred dollars, and on the same day took from him a mortgage of the premises, as a collateral security for the payment of the sum advanced; and that afterwards the complainant being unable to pay the money, agreed to execute an absolute deed to the defendant, for the same property, in consideration that he would extend the time of payment, and give him a bond for the re-conveyance of it, on payment of the amount at the expiration of twelve months from the date; both of which instruments, the absolute deed, and the bond to re-convey were accordingly executed on the same day, the 7th of November, 1828.

The case is brought up by appeal from the Chancellor's decree, and the questions raised in argument are,

1st. Whether this is a case of *mortgage*, or a *conditional sale*.

2d. If it is to be considered as a mortgage, whether the defendant should be allowed for the permanent improvements put up by him upon the premises.

As to the first question, whether it is a case of mortgage, or conditional sale; it may here be remarked, that it is treated in the decree, as a case of mortgage, which decree has not been appealed from, but acquiesced in by the defendant, and we can perceive nothing to be objected to in that view of the Chancellor. But the question being made, it will be briefly examined. It cannot be doubted, that two persons capable of contracting, may contract for the purchase and sale of real estate, defeasible by the payment of money at a future day. That is, that a sale and conveyance may be made, with a right reserved to the vendor to *re-purchase* the property at a price agreed upon, and at a specified time. Such a transaction would be a conditional sale, without a right of redemption in the vendor, after the expiration of the time fixed upon for the payment of the stipulated price. But it is sometimes exceedingly difficult to draw the line between a mortgage, and a conditional sale; to determine whether the purpose of the parties was to treat of a *pur-*

chase at a price agreed upon; or whether the object of the transaction was a security for the payment of a pre-existing debt, or the re-payment of money advanced, or lent, of which the case of *Conway's Executors vs. Alexander*, 7 *Cranch*, 218, is a striking example; where the judges had much difficulty in arriving at the conclusion, that it was a case of conditional sale. So there may be a sale of the equity of redemption to a mortgagee, where the transaction is fair, untainted with any advantage taken by the mortgagee in the use of his incumbrance, of the necessities of the mortgagor, to influence him to dispose of his estate for less than the real value. But a transaction constituting a mortgage, cannot be converted into a *sale*, and lenders of money being less under the pressure of circumstances calculated to control the free exercise of the judgment than borrowers, they may often be tempted to avail themselves of that advantage, in order to attain unequitable bargains. The leaning of courts of equity therefore is against them, and doubtful cases have generally been decided to be mortgages. The inquiry is, and must always be, whether the contract in the particular case, is a clear actual *sale*, or a security for a debt due, or for the re-payment of money lent.

Whenever the intention is to take a security for a subsisting debt, or for money lent, and to avoid or restrict the equity of redemption, Chancery seeking to protect the debtor against the rapacity of the creditor, and to do full and equal justice between the parties, will defeat such intention, by treating the transaction as a mortgage, and extending to the debtor the benefit of the equity of redemption, and compelling the creditor to accept the principal and interest of his debt; which is all that he is in justice entitled to, or ought to seek to attain.

A covenant to pay the debt, or to repay the money lent, is not (though proper to be introduced) an indispensable ingredient to a mortgage. If a security for the money is intended, that security is a mortgage, though not bearing upon its face the form of a mortgage, which chancery does not

Dougherty vs. McColgan.—1834.

respect, but looking through the whole transaction as far as it can, (with the defeasance, if there be one,) to ascertain the true character of the contract; if it be found to be different in reality from the appearance it assumes, will remove the veil with which it is covered. And where the relation of mortgagor and mortgagee is once fairly established, though the equity of redemption may be sold or disposed of to the mortgagee; yet unless the transaction appears to be fair, and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor.

Let us then apply these principles of equity to the case before us. Here there was a loan of money, and a mortgage given on the 13th of May, 1828, as a collateral security for the re-payment of it. We find that on the 7th of November, of the same year, an absolute deed for the same property was given by the appellant to the defendant, accompanied by a defeasance, or bond of conveyance, on the payment by the appellant, at the expiration of twelve months from the date of the same sum of money, for which the original mortgage was given as a collateral security.

These two instruments are stated in the answer, to have been made on the proposition of the appellant, professing his inability to redeem the mortgage within the time stipulated, to give to the defendant an absolute deed, if he would extend the time limited for *re-payment* of the sum, to secure which the original mortgage was given, and also execute to him a bond for the *re-conveyance* of the property on payment of the money, at the expiration of twelve months from the date.

An absolute deed of conveyance, and an accompanying defeasance, or bond for reconveyance of the property to the grantor, on his paying a specified sum of money, will not always, and necessarily, constitute the transaction a mortgage; but it may according to circumstances be a conditional sale—as where the deed is not given to secure the pay-

ment of a pre-existing debt, or of money lent, but the negotiation is for the *purchase* and *sale* of the property, with the *mere privilege* of *re-purchasing* at a stipulated price. This is put only as an example. But where the contract is for the securing of money, the transaction is in equity deemed a mortgage. In this case there was no negotiation for the sale and purchase of the property; on the contrary, there was a debt due originating in a loan of money, and the negotiation was for an extension of the period of *re-payment* arising from the professed inability of the complainant to pay it at the stipulated time. No new consideration passed; to obtain further time by a debtor straightened in his circumstances, was the only inducement to the deed, and the payment on which the property was to be re-conveyed, was merely a *re-payment* of the very sum that was lent. And it is in proof, that the defendant thought that, that sum was less than the value of the property.

It is alleged in the answer, but no where proved, that the proposition to give an absolute deed, and take a bond of reconveyance moved from the complainant. Suppose it did; it was made by a necessitous debtor, under the pressure of circumstances, and the fear that he would be unable to pay the money at the time limited in the former mortgage; and from his condition, ignorant probably of his equity of redemption, secured to him by that instrument. It is by no means clear that the defendant did not himself consider it as a mortgage. He twice extended the time of payment after the expiration of the twelve months limited by the bond of conveyance; sometimes spoke of it as his, the appellant's property, frequently saying that he should have it again, if he would pay him the money. At one period indeed he said, that the complainant should never have it, if he could prevent it; at another time, when the money was offered by the complainant, that he would not let him have it, as he had been at the expense of insuring it; and once when speaking of the bond of reconveyance, he said, that *if it was not for that paper, he would have it safe enough.*

On the other hand, it would appear that the complainant never supposed it to have been a *sale* of the property, but only a security for the debt; frequently demanding it; at one time saying, that the defendant was much changed, and wished to cheat him out of his property, under the advice of others; and at another time charging one of the witnesses with being his adviser.

It is also proved by one of the witnesses, that the defendant told him, the complainant had offered to pay him the money, but that he had given him three months longer, in order that he might return the money again. And in speaking to another witness *of the way in which he came to get the property*, he said that the complainant *was insolvent, and wanted money, and was unable to pay the debts he had contracted, and came to him to borrow money, and had this property*; at the same time stating, *that he had given the appellant a paper, by which the property was to fall back again to the appellant, if he paid the money within a certain time; that the time limited had run out about a year. That the money had not been paid, and that he then (at the time of the conversation) supposed that the property was his, and very cheap.* The conversation with this witness is worthy of some consideration, as tending to show, not only the pressure of adverse circumstances, under which the appellant was laboring, (his urgent want of money, and supposed state of insolvency, and inability to pay his debts) and therefore a fit subject, and in a state of mind and feeling, to be prayed upon; but also to show that if the defendant did not take advantage of his necessities, he did not at that time at least, consider the property as *sold* to him, but that it was given as a security for the money, which was not equivalent to its value, and had become his, by reason of the non-payment of it. And if the transaction was at the time it was entered into, a security for money lent, it continues to be so, notwithstanding the money was not paid at the expiration of the twelve months after the date of the bond, and has not yet been paid. This transaction if considered

as of a doubtful character, would be treated in Chancery as a case of a mortgage. But seeing that there is no evidence of a negotiation for the sale and purchase of the property; that the debt originated in a loan, or advance of money; that the deed of the 7th of November, 1828, was given in consideration of an extension of time for the re-payment of it, with no additional advance of money by the defendant; that the complainant at all times considered himself as entitled to redeem; always keeping up a continued claim, and that he twice offered to repay the money, which was considered by the defendant himself, as less than the value of the property; all this, in connexion with the other facts and circumstances of the case, strongly shows the character of the transaction to have been that of a security for the money, and gives to it the properties of a mortgage. This brings us to the examination of the other question properly before us; whether the defendant should be allowed for the permanent improvements put by him upon the premises?

It is a general principle in Chancery, though not without exceptions, that a mortgagee in possession is not to be allowed for new improvements erected upon the premises; and this works no hardship upon the mortgagee, who before foreclosure is not the substantial owner, nor under any obligation to make any repairs but such as may be necessary. But as a general rule, it is proper and necessary for the protection of the rights and interests of mortgagors, who would otherwise be very much at the mercy of their mortgagees. If it were otherwise, a mortgagee might from whim or caprice make what he considered to be improvements, but such as the mortgagor would not choose to have made. A mortgagor might be in a situation to redeem, by paying the principal and interest of the debt; but wholly unable to redeem, if obliged to pay also for such improvements as the mortgagee might be able and think proper to erect. Such a clog upon the equity of redemption would be subject to great abuses, and increase the difficulties in the way of the right to redeem, and might be resorted to

by a mortgagee, knowing, and disposed to take advantage of, the necessities of the mortgagor, as a means of defeating the equity of redemption.

Here, the defendant claims to be allowed for houses erected by him upon the mortgaged premises; and we are to inquire whether, under all the circumstances, this case falls within any of the exceptions to the general rule.

The property mortgaged, taking the acknowledgment, (or it may be said) the boast of the defendant himself, exceeded in value the amount of the sum lent; and there is no proof that it had ever begun to fall into a state of decay and dilapidation, which threatened so to diminish its value, as that it would not be an adequate security for his money. There is no evidence that the houses standing upon the premises were in a ruinous state, and that he pulled them down and built the new ones as a substitute, and for the purposes which they served: on the contrary, the new houses were erected for new and other purposes. There was no long continued possession, and acts of ownership by the defendant, and acquiescence by the complainant, with no claim of the right to redeem, begetting the belief on the part of the defendant that the mortgaged premises belonged to him.

But the deed and defeasance were executed on the 7th of November, 1828, and the houses were begun not quite three years after, and not finished when the bill was filed on the 7th of March, 1832; during the whole of which time there was a continued claim by the appellant of the right to redeem; sometimes charging the defendant with a design to cheat him, and twice offering him the money, and demanding the property, the last time in August, or September, 1831, when the defendant refused to let him have the property, on the alleged ground that he had been at some expense in insuring it, but gave him no notice of his intention to put up the new improvements, which were commenced in October, 1831, not more than one or two months after, and there is no proof that the complainant ever had notice of his intention to build.

Not only was there this continued assertion of right by the appellant, accompanied by the observation by the defendant to one of the witnesses, that if it was not for that paper, (speaking of the bond for re-conveyance,) he would have it safe enough, clearly showing his own doubts upon the subject of his own right, which surely, taken together, was quite sufficient to have put him upon the inquiry, which any prudent man, or one disposed to do what was right, would have made; but there is besides proof of his frequent declarations, that the appellant should have *his* property again, if he would pay him the money.

Under such circumstances it is difficult to conceive, that he confidently believed the property belonged absolutely to him, notwithstanding he once said, that as the money was not paid at the expiration of the time mentioned in the defeasance, *he supposed it was his*; and his declaration, that the appellant *should never have it if he could prevent it*, being a qualified declaration, and not a positive assertion of right, would seem to be explained by the fact, that in October, 1831, not more than two months after he had refused to receive the money and give up the property, on the pretence that he had been at the expense of insuring it, concealing his intention to put up the new improvements, he commenced building in the absence, and without the knowledge of the appellant, with a view, as it would appear, to make good his threat, *that he should never have it, if he could prevent it*, under the supposition, (as he had before said he was insolvent,) that he would not be able to redeem it with that additional charge upon it.

The circumstance that the appellant was in *Baltimore*, and saw, and spoke of the improvements after they were begun, is not sufficient evidence of his approbation, or acquiescence to charge him with the cost of them. He had been refused the property on his offering to pay the money, not more than a month or two before, and had gone away without being consulted by the defendant, who took advantage of his absence to commence the buildings. And he

Clarke and Wife vs. State use of Williams.—1834.

may well have thought that it was useless to say any thing about it, as it was not very probable that he who had refused to let him have it merely because he had effected insurance upon it, would do so, after he had begun to improve it, or pay any attention to any thing he could say. But he did all that was left for him to do; he filed his bill to redeem, within five months after the buildings were commenced, and before they were finished.

We do not think therefore, that this case falls within the principle of any case which is now recollected, that has been excepted out of the general rule.

The defendant made the improvements in his own wrong, and at his own hazard, and cannot be allowed for them.

THE DECREE, AS TO THE ALLOWANCE MADE FOR IMPROVEMENTS, REVERSED, WITH COSTS IN THIS COURT.

CLARKE and WIFE, Adm'rs of UNDERWOOD, vs. STATE USE WILLIAMS, Ex'tx of WILLIAMS.—December, 1834.

Where joint administrators unite in the same testamentary bond, they are jointly and severally answerable, not only each for his own acts, but also each for the acts of the other. When they do not design to place themselves in that attitude, they should execute separate bonds.

So where the plaintiff had obtained judgment against H, as the surviving administrator of U, and issued a *fi fa.*, upon which the *nulla bona* was returned, and then sued the administrator of C, (who had been in his life-time joint administrator with H, upon the estate of U, upon the joint testamentary bond of H and C; it was HELD, that for this *devastavit* of H, the joint bond was answerable.

APPEAL from *St. Mary's* county court.

The suit was instituted on the 8th of February, 1831, by the appellee, against the appellant, as the administrators of *Calistus Underwood*, the co-administrator with one *Robert Holton*, of *Jeremiah Underwood*, deceased.

The bond on which the action was brought is dated Oc-

tober 13th, 1821, and conditioned in the common form for the faithful performance by *Holton*, and the appellant's intestate, of their duty as administrators of the said *Jeremiah Underwood*.

To the appellant's plea of performance of the condition of the bond, the appellee replied, setting out a judgment recovered by her against *Holton*, the surviving administrator; the issuing of a *fieri facias*, and the return of *nulla bona* thereon.

To this replication the defendants demurred specially.

1. That it appears by said replication, that no judgment was obtained against *Jeremiah Underwood* in his life-time, or against his administrators in the life-time of the said *Calistus*, who was one of them; but charges him with a *devastavit* committed by *Holton*, the surviving administrator.

2. That no breach is assigned as having been committed by the said *Calistus*, either separately, or jointly with said *Holton*.

The plaintiff joined in the demurrer, and the judgment of the county court upon it being in her favor, the defendants appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and DORSEY, and CHAMBERS, J's.

John M. S. Causin, for the appellants, contended,

1. That one executor or administrator is not liable for the *devastavit* of another, unless he has in some way contributed to its commission. *Tollers' Ex's*, 407, 429. 2 *Ves. Jr.* 267. 1 *Chitty*, 546. *Statute Chas.* II. *ch.* 23. Executors may sever in pleading, and a judgment against one cannot be binding on the other.

The act of 1798, *sub-ch.* 3, *sec.* 1, provides, that each executor shall give bond for the performance of his duties, and upon the death of one, every power and obligation resulting from the office, devolves on the survivor, just as though the letters of the deceased had been revoked by the

proper authority. The condition of executors or administrators in this respect, is analagous to that of partners, among whom death devolves rights and responsibilities to the survivors.

2. Nor can the deceased executor be charged as the surety of the survivor, from the circumstance of their uniting in the same bond. The bond is to be treated as the separate bond of each, though the sureties are answerable for both. If the principals in the bond can be considered as reciprocally sureties for each other, then when there are three or more sureties, *eo nomine*, might be dispensed with, which is in conflict with the policy of the law. It will hardly be denied, but that the death of one of the executors discharges him as a principal in the bond, for all the acts of misconduct or mal-administration subsequently committed; and if so, it would be singular, if he is to continue responsible as surety, when the relation of surety is raised by implication merely. Besides, regarding the deceased executor as a surety for the survivor; then if he is made to pay the money, he or his representatives could call on the sureties *eo nomine* for contribution, which will scarcely be contended for.

If each executor is liable, as surety, for the other, they should have the privileges belonging to that situation, and among them the right to call on the co-executor for counter security. 3 *Johns. Cas.* 53.

Tuck, for the appellee.

It is admitted, that in *England* you cannot charge one executor *as such*, with a *devastavit* committed by his associate. But it does not follow, that they are not mutually and reciprocally responsible for each other, where they unite, as is the case here, in the same bond. The responsibility of parties to a bond here, and in *England*, under the statute of *Charles*, is not the same. 1 *Salk.* 316. 1 *Wms. Ex'rs*, 332-3. In *England*, one executor cannot compel another to give counter security, which may be done here under the act of 1816, *ch.* 203, *sec.* 4.

Penn. Delaware and Maryland Steam Nav. Co. vs. Hungerford.—1834

This case is to be decided upon the *Maryland* law, and the rights and responsibilities of the parties depend upon the contract as expressed in the bond.

The two administrators entered into a joint bond, which makes them answerable as well for the acts of each other as for themselves. The performance of either discharges the bond, but there must be a performance by one, or both.

DORSEY, J., delivered the opinion of the court.

We cannot adopt the anomalous character attempted to be given to the bond on which the present action is founded, viz: that it is, as it were, the separate bond of each administrator, in which the securities are bound for both; but the administrators are not responsible the one for the other. Had the administrators designed to place themselves in that attitude, they should have executed separate bonds. By the unequivocal import of the present obligation, which we cannot control, and are not at liberty to depart from, they are jointly and severally answerable, not only each for his own act, but also each for the acts of the other. Concurring in opinion, therefore, with the county court,

JUDGMENT AFFIRMED.

THE PENNSYLVANIA, DELAWARE and MARYLAND STEAM
NAVIGATION COMPANY vs. THOMAS B. HUNGERFORD.—
December, 1834.

A principal is responsible for the negligence or misconduct of his agents or servants, while acting in his employment; and any person who sustains an injury by such negligence or misconduct, may resort to the principal for indemnity and redress.

Where the slave of the plaintiff was carried on board a steam boat of the defendant, an incorporated company, and the captain of the boat, on the eve of its departure, informed of the slave being on board, told the plaintiff's agent to search for her, but made no search for her himself, and the

Penn. Delaware and Maryland Steam Nav. Co. *vs.* Hungerford.—1834.

slave was in fact carried off in the boat, and lost to the plaintiff; the court would not permit the jury to consider whether the agents of the defendant were guilty of misconduct or negligence in permitting the escape of the negro, and **HELD**, that it was the duty of the master of the boat to have made such a search as would have prevented the escape of the slave, and not doing this, the owners of the boat were responsible.

APPEAL from *Baltimore* county court.

This was an action on the case brought by the appellee against the appellants, on the 14th of April, 1832, to recover damages of them for carrying in their steam boat, out of the State, the slave of the plaintiff, whereby she was lost.

Issue was joined upon the plea of not guilty.

1. The plaintiff proved at the trial by *William E. Hungerford*, that in 1819, he purchased negro *Henny* (the slave in question) of *Richard Batturs* for \$250. That afterwards he conveyed her to his brother, the plaintiff, who gave him liberty to use her free of all wages, until he should be married, and that the negro was in the possession of witness, under directions to be returned to his brother, at the time she was carried away from *Baltimore*. That on the 18th of March, 1828, a young gentleman came to the house of witness to inquire about this negro, and on the following morning a carriage came to his door, and drove off with her. That witness pursued, and saw her go on board the steam boat, and went down, and told captain *Pearce* of that steam boat, that he suspected she was on board. That *Pearce* then told witness to search for her every where but in the ladies' cabin, which witness did, but could not find her, and having stated this to the captain, he promised witness, if she was on board to bring her back from *Frenchtown*. That the negro was carried to *Philadelphia*, and has never been returned. That when the steam boat returned, the witness saw captain *Pearce*, who informed him the slave was on board, and claimed by *Batturs* and his daughter at *Frenchtown*. That *Batturs* paid her passage and took her on. That she was a valuable house servant, worth \$250.

The defendant then proved by captain *Pearce*, that on

Penn. Delaware and Maryland Steam Nav. Co. vs. Hungerford—1834.

said *Hungerford's* representing to him that said negro was on board, which was from five to eight minutes before the boat left the wharf, he pointed to a police officer, and directed him, *Hungerford*, to go and take the officer and search all parts of the boat for the negro. That *Hungerford* did not take the officer, as far as he recollects. That witness did not prohibit *Hungerford* from searching any part of the boat. That officers are always placed on board these boats before their departure, to prevent runaways from escaping. That when the steam boat reached the canal, the witness saw a negro woman with *Mr. Batturs*, for whom *Mr. Batturs* paid as his servant; and in answer to captain *Pearce's* inquiries, represented, that she was his, *Batturs's*, servant. That *Batturs* and *Hungerford* were both strangers to him. The plaintiff further proved, that the steam boat, of which *Pearce* was the commander, and in which the plaintiff's slave was carried out of the State of *Maryland*, was the property of the defendants.

Upon this proof, the defendants prayed the court to instruct the jury, that if they believed, that neither the defendants, nor their servants, or agents, were guilty of any misconduct or negligence, in permitting the escape of said negro, claimed by the plaintiff, that the plaintiff is not entitled to recover. But the court (*PURVIANCE*, A. J.) refused to give the instruction; and the verdict and judgment being for the plaintiff, the defendants prosecuted an appeal to this court.

The cause was argued before *BUCHANAN*, Ch. J., and *STEPHEN*, *DORSEY*, and *CHAMBERS*, J.

Johnson, for the appellants.

The argument of the counsel of the appellees, assumes what the evidence in the case does not justify, that the captain or the agent of the defendants, had *actual knowledge* that the slave in controversy was on board his boat, on the morning of the 19th March, 1828.

Penn. Delaware and Maryland Steam Nav. Co. vs. Hungerford.—1834.

The testimony of the witness from the appellee was, that he informed the captain that he *suspected* she was on board, *not* that he *knew* her to be there. This was a very few minutes before the boat's time for starting, and just as she was on the eve of leaving the wharf. The captain's evidence is, that he gave the witness referred to, unlimited permission to search the boat in every direction, and requested him to take a police officer, then on board, to aid in the search. The search proving unavailing, the boat left the wharf, and the captain was justified, *from the fact that the search so made was unavailing*, in inferring that the *suspensions* of the witness were unfounded. After arriving at the other end of the route, only *one* black person was found on board, and she was represented by the gentleman and lady with whom she was apparently travelling, to be their servant, and *paid* for accordingly. Under the circumstances, had the captain not a right to suppose that this was the fact, or would he have been authorised to have detained the woman, and her alleged owners, until he could send to *Baltimore*, or return to *Baltimore*, and find out the witness of appellee, who was entirely unknown to him, and submit to him the question of ownership?

It may be conceded, that color alone is *prima facie* evidence of slavery, without its affecting the question in the present case. The inquiry is not whether the woman was actually or constructively to the knowledge of the captain a slave, but whether she was the slave of the plaintiff, or rather of any one else than the alleged owners, in whose charge she was travelling. It would be attended with great practical inconvenience to masters, or with great injustice to carriers of this description, if they could never transport a slave apparently travelling with its owner, except at the hazard of liability to the true owner, should he be other than the apparent owner.

Where a slave is found on board a steam boat without a claimant, and an unsuspected one, it may be admitted, and policy requires that the rule should be so, that the compa-

Penn. Delaware and Maryland Steam Nav. Co. vs. Hungerford.—1834.

ny are responsible to the true owner for his value, should the slave be lost. But it is submitted that, in a case like the present, it would be as unjust as it would be impolitic, to hold the company to such a liability. The court are referred to the following acts of assembly, which are believed to be all that can in any degree relate to this case. Take them altogether, and consider the whole as constituting a system, it is submitted that knowledge either actual or *implied*, is required to render the carrier responsible. April, 1715, *ch.* 19, *sec.* 5. *Ib.* 1715, *ch.* 44, *sec.* 4. *Ib.* 1744, *ch.* 19. 1753, *ch.* 9, *sec.* 2. 1805, *ch.* 96. 1817, *ch.* 112, *sec.* 6.

Gill, for the appellee.

This is an action on the case brought against the Navigation Company, to recover the value of a negro slave, carried off from *Baltimore* to *Frenchtown* and *Philadelphia*, in the steam boat of the appellants, and thus lost.

The case presented by the proof is, that the defendants after notice to their agent, the captain of one of their steam boats, carried off the slave of the plaintiff in their boat from *Baltimore* to *Frenchtown*, and that the slave was lost. The knowledge or notice of the fact that the negro was on board the boat, is admitted by the witnesses on both sides.

In this state of the case, the defendant prayed the county court to instruct the jury, that if they believed neither the defendant, nor their agents were guilty of any misconduct or negligence, in permitting the escape of the negro claimed by the plaintiff, the plaintiff cannot recover. This was refused, and it is from this, the appeal was taken.

The form of the prayer admits the escape of the negro, and that too in the defendants' boat. But it insists, that whether the defendants were guilty of negligence was a question for the jury; that is, if the defendants adopted proper measures to prevent the escape of the negro they were not responsible. The proof does not show that the defendants' agents adopted any measures on this occasion;

Penn. Delaware and Maryland Steam Nav. Co. vs. Hungerford.—1834.

informed of the fact, they made no special search, he, (the captain) merely gave the plaintiff's agent an opportunity of searching for the negro. The defendant's own proof shows they were guilty of negligence. Informed of the fact, that the property of the plaintiff was on board of the boat, they carry it off, and this is negligence and misconduct.

This court has decided, that if a party knowingly takes off the apprentice of another, he is responsible in damages; that if, when he received the apprentice, he did not know the fact, yet coming to the knowledge of it afterwards, and then retaining or carrying off the apprentice, he is responsible. *Fergusson vs. Tucker*, 2 Harr. and Gill. 82. Now upon the last proposition, even if this was for carrying off an apprentice, the appellant could not have put his defence upon the fact of his negligence; for negligent or not, knowing the fact that the slave was on board, and not putting her ashore at *Baltimore*, he is responsible to the plaintiff. Considering a slave as property, personal property, there can be no doubt, that for the agents taking off the property of the plaintiffs in the steam boat after notice, the owners would be responsible.

Where a slave, the property of the plaintiff, was carried from *New Jersey* to *New York* in the defendant's ferry boat, without the consent or permission of the plaintiff expressly given, the slave not returning, the defendant was held responsible for his value. *Gibbons vs. Moore*, 2 Halsted's Rep. 262. The second point decided in this case (p 263) shows that the acts and orders of defendants to prevent the escape of slaves, will not avail the defendants.

And this corporation is responsible for the acts of its agents. See *Angel on Corporations*, and cases there cited.

The act of 1715, ch. 19, sec. 5, gives an action for transporting any slave out of the province, and all negroes being *prima facie* slaves, the person transporting, carries them off at his peril.

Penn. Delaware and Maryland Steam Nav. Co. vs. Hungerford.—1834.

Under the circumstances, it is contended to be entirely unimportant, whether the jury believed the defendant was guilty of negligence or not.

1. Their authorised agent had notice that the negro was on board.

2. Even if no notice existed, all persons trade with, or carry off negroes at their peril; their color demonstrates them to be slaves, and this puts all parties dealing with them upon inquiry.

STEPHEN, J., delivered the opinion of the court.

The rule of law is well established, that the principal is responsible for the negligence or misconduct of his agents or servants, while acting in his employment; and that any person who sustains an injury by such negligence or misconduct, may resort to the principal for indemnity and redress. We think when the witness of the plaintiff represented to the captain that he had reason to believe, that the slave of the plaintiff was on board his boat, it was a duty legally incumbent upon him to have made, or cause to be made, such a search as would have prevented the escape of the slave from the service of her owner; and that if he failed in the performance of this duty, he was legally responsible for the consequences. The information he received was sufficient to have put him upon inquiry, and if he failed to make the necessary examination he acted at his peril, and his employers are responsible in point of law, for the loss which the master has sustained in consequence of that omission. Having failed to perform this legal duty, in consequence of which the slave was enabled to make her escape from the service of her master, we think that the company are responsible to him in damages, and that the court below were right in refusing to grant the prayer of the defendant. The facts given in evidence, if believed by the jury, were sufficient to establish a legal liability on the part of the company, and the court were right in refusing to submit such liability to their decision, upon the ground of negligence or miscon-

 Ranahan vs. O'Neale, Jr.—1834.

duct, as stated in the defendant's prayer; as the granting of such direction might have had the effect of misleading them in the formation of their verdict. It is the peculiar province of the jury, to find from the evidence the truth of facts, and it is the duty of the court to declare the law arising upon the facts, when so found by them.

The court we think were therefore right in refusing to give the instruction as prayed.

JUDGMENT AFFIRMED.

MICHAEL RANAHAN vs. WILLIAM O'NEALE, Jr.—
December, 1834.

Certain personal property was attached by the sheriff under writs from the creditors of M, and no person appearing to defend the suit or make claim, the property was condemned; upon which judgment a *fieri facias* issued, and a sale took place; after which R, who had notice of the service of the attachment, and who, at the time of the attachment, had notified the sheriff of his claim to the property attached, brought an action of trespass against the sheriff, for taking and selling the goods in question, and recovered a verdict co-extensive with his claim. Upon a case stated, submitting to the court, whether upon the facts agreed on the plaintiff was entitled to retain the verdict, IT WAS HELD, that he was not entitled to recover against the sheriff both for the attachment and sale.

A sheriff is not responsible for an act, as a *tort*, which as a public officer he is bound to perform. In selling property under *fieri facias*, which before had been specifically condemned by a court of competent jurisdiction, the sheriff is not responsible to the party claiming title to the property though no party to the suit, and especially where the plaintiff might have claimed the property before condemnation, and neglected to do so.

APPEAL from *Montgomery* county court.

Trespass commenced by the appellant against the appellee on the 12th of March, 1832, for taking and selling certain articles of personal property.

There was a verdict for the plaintiff, subject to the opinion of the county court, upon a case stated, the material

facts of which are contained in the opinion of this court, as follows, viz.

This was an action of trespass, for taking and selling certain personal property seized by the appellee while in the possession of the appellant, by virtue of two writs of attachment, issued out of *Montgomery* county court, and to him (the appellee) directed, as sheriff of said county. The property was attached by the sheriff, as the property of a certain *Patrick Maloney*, to satisfy debts due by him to two of his creditors. The appellant claimed title to said property under a deed of trust, from *Maloney* to him, for a valuable consideration, bearing date subsequent to the issuing of the writ of attachment, but prior to the service thereof upon the property in controversy. The plaintiff in said suit obtained a verdict for damages, which, it was agreed by the parties, should be subject to the opinion of the court upon a case stated. Upon the facts agreed between the parties, the court below gave judgment for the defendant, and the plaintiff has appealed to this court. The appellant claimed as his property under the said deed of trust, the goods and chattels upon which the attachment was laid. The writ of attachment contained the usual clause of *scire facias*, but it does not appear that the appellant was ever warned to appear, conformably to the mandate of the writ. It however distinctly appears in the statement of facts, that he had notice of the service of the attachment, and that he notified the sheriff at the time, of his claim of title to the property. He did not however appear as garnishee, or in any other character, on the return of the attachment, to defend his title to the property attached; in consequence of which a judgment of condemnation was obtained, upon which writs of *fieri facias* were issued, and the property sold in virtue thereof. The county court having given judgment for the defendant, upon the case stated, the plaintiff brought the record before this court by appeal.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

Brewer, for the appellant, contended.

That the deed to *Ranahan* was effectual from its date, and from that time divested *Maloney* of the property in the chattels contained in it, and vested the same in the appellant; and that the attachments did not bind said property, either from their dates or delivery to the sheriff. Foreign attachments, unlike writs of *fi fa*. do not bind the goods of the defendant from their delivery to the sheriff, their object being simply to compel an appearance. 2 *Back. Abr.* 258. The property is not changed until after condemnation. *Law of Attach.* 149. 1 *Salk.* 28.

Magruder, for the appellee.

The appellant had notice of the service of the attachment, and might have appeared to it. *Campbell and Morris*, 3 *Harr. and McHen.* 535, 552. Having omitted to do so, and suffered a judgment of condemnation to pass, he cannot be permitted to sue the sheriff, for taking and selling the property under the *fi fa*.

STEPHEN, J., delivered the opinion of the court.

It is true that in actions of trespass similar to the present, the plaintiff is not bound to prove the whole of his *gravamen* as laid in his pleadings, but may recover less than he claims, and according to the extent of his proof as given to the jury; but in this case we are informed by the statement of facts, that the suit was brought for taking and selling the property in question, and damages have been assessed by the jury co-extensive with the plaintiff's claim; and the question submitted to the court was, whether the plaintiff was entitled upon the facts agreed, to retain the verdict and to have a judgment entered upon it. The question therefore presented to the court for their decision seems to have been, whether the plaintiff was entitled to recover

generally, or in other words, whether he was entitled to recover to the whole extent of his demand.

We do not think that his right to recover can be sustained to that extent, as it would involve the responsibility of the sheriff for an act, as a *tort*, which as an officer of the law he was bound to perform. In selling the property under the *fieri facias*, he cannot be considered as a trespasser or wrong doer, and responsible in damages to the party claiming title to the property. He acted only in obedience to the mandate of the law, and it would be strange if the law, whose mandate he obeyed, should hold him responsible in damages for such obedience. Nor was it essential to justice in this case, that the appellant should be entitled to call in question the legality of the sale so made, in order to vindicate his rights of property, if wrongfully seized or illegally violated; because having had notice of the attachment of his property, as claimed by him, he had a right on the return of that attachment, to have appeared in court, and there moved to have quashed the attachment. In *3 Harr. and McHen.* 552, 553, the former chief judge of this court, in delivering the opinion of the court in the late general court, upon the case of an attachment then pending before him, lays down the following principles in relation to that species of process, and the mode of proceeding under it. He there says, that “for an apparent defect in the proceedings before the court, the attachment may be quashed, upon suggestion of such defect to the court, either by the defendant himself, or a third person claiming an interest in the property attached. The attachment being a summary proceeding, not changing its nature until there is an appearance with bail, every fact is cognizable by the court which will shew the attachment issued irregularly, or to show the property attached does not belong to the defendant, and evidence *dehors* or extrinsic, the proceedings may be resorted to, and the proof is to be made to the court, because the proceeding is summary and without the intervention of a jury.” The appellant then, in this case, having

full knowledge in fact of the attachment of his property, although it may be that he was not legally warned by the sheriff, might have appeared if he had thought fit, and moved the court to release, or exonerate it from the effect and operation of the attachment. This he did not do, in consequence of which it was condemned, and rendered liable to execution and sale, for the purpose of satisfying the plaintiff's claim.

Upon the best and most mature consideration we have been able to give the subject, we think that there is no error in the judgment of the court below, and that the same ought to be affirmed; the sheriff having sold the property by virtue of a *fieri facias*, issued upon the judgment of a court of competent jurisdiction, cannot be responsible in damages for making such sale. 10 *Johns. Rep.* 138. In that case the rule is stated to be, that "where a court has jurisdiction of the subject matter, it is sufficient to justify the officer executing its process, for the officer is not bound to examine into the validity of its proceedings, or the regularity of its process." To the same effect see 10 *Coke*, 76, where the distinction is stated to be this, "where a court hath jurisdiction of the cause, and proceedeth *inverso ordine*, or erroneously, there the party who sueth, or the officer, or minister of the court who executeth the precept or process of the court, no action lieth against them. But when the court hath not jurisdiction of the cause, then the whole proceeding is *coram non judice*, and actions lie against them, without any regard of the precept or process." The authorities above cited clearly shew, that the sheriff in the case before this court, was justified in making the sale, and of course was not responsible in damages for that act.

JUDGMENT AFFIRMED.

Estep and Hall's Lessee vs. Weems, et al.—1834.

ESTEP AND HALL'S LESSEE vs. WM. WEEMS, et al.—
December, 1834.

In an action of ejectment, brought by a purchaser, to recover the possession of land purchased by him at a sheriff sale, it is not necessary for the plaintiff to prove a seizure of the land by the sheriff, for the purpose of supporting his title.

It is the *sale* of the sheriff which vests the title in the purchaser, which *sale* must be proved either by a deed, the sheriff's return to the *fieri facias*, or *vedi*, or memorandum in writing, in order to comply with the statute of frauds.

When the plaintiff in ejectment claimed title under a sheriff's sale, and in proof of his title showed a judgment, *fieri facias*, *vedi* describing the land sold with sufficient certainty, and deed from the sheriff who made the sale, no error or defect in the schedule made at the time of the levy under the *fieri facias* can be relied upon to defeat the sale.

APPEAL from Calvert county court.

Ejectment to recover two tracts of land in Calvert county, called, "*Chew's Purchase*," and "*Grantham*," instituted by the appellants on the 7th of September, 1832.

The appellees took defence on title, and pleaded not guilty.

Upon the evidence, which is fully stated by the learned judge who delivered the opinion of the court, the county court (DORSEY, Ch. J. and KILGOUR and WILKINSON, A. J's.) decided that the plaintiffs were not entitled to recover; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

Brewer and *Pinckney*, for the appellants, contended,

1. That the recital in the *venditioni exponas*, of the schedule returned with the *fieri facias*, is sufficient evidence of the seizure under the latter writ. 1 *Johns. Cases*, 155. 1 *Shep. Touch.* 88. 4 *Cruise Dig.* 418.

2. That if the recitals in the *venditioni exponas*, are not of themselves sufficient, they are when taken in connexion with the evidence detailed in the second exception.

3. That the deed from the sheriff, independent of all other proof, is sufficient evidence of the seizure and sale, and passed the title to the purchaser. 4 *Harr. and McHen.* 72. 1 *Harr. and Johns.* 410. 5 *Ib* 69. 1 *Gill and Johns.* 443. 1 *Johns. Cases*, 155. 6 *Harr. and Johns.* 204. 10 *Johns. Rep.* 223. 15 *Ib.* 309.

4. But if no one act of the sheriff can be relied on as adequate evidence of the sale, the purchaser is entitled to the benefit of all his acts and returns taken collectively, and if from the whole so taken, the sale is sufficiently established, the plaintiffs were entitled to judgment. 1 *Gill and Johns.* 443.

Boyle, for the appellees.

There does not appear to have been any connexion between the *fieri facias* and *venditioni exponas*, and the schedule recited in the *venditioni exponas* appears to have been returned by a former sheriff, and for that reason did not afford a sufficient foundation for it, as the sheriff who seized the property levied on, should have sold it. *Salk. Rep.* 323. *Act 1779, ch. 25, sec. 11, &c.* *Purl's Lesse vs. Duvall*, 5 *Harr. and Johns.* 69.

STEPHEN, J., delivered the opinion of the court.

This action of ejectment was instituted in the court below, to recover several tracts or parcels of land, purchased at a sheriff's sale. To prove title in the purchaser, the plaintiff offered in evidence, in the first bill of exceptions, a *venditioni exponas*, after having first offered in evidence the judgment, and *fieri facias*, upon the return of which the said *venditioni exponas* was issued. The *fieri facias* was returned, "laid as per schedule." The defendants objected to the offering of the said writ of *venditioni exponas* in evidence, unless the schedule referred to in the return to the said *fieri facias* was also offered, or some other evidence of the seizure of the premises in question; and the court thereupon instructed the jury that to enable the plain-

tiff to recover in that suit, in virtue of any title by them derived, under a sale made under the said *fi fa*, and *venditioni exponas*, some other evidence of the seizure of the said land under the said *fieri facias*, than is offered by the mere production as aforesaid of the said *fieri facias*, and *venditioni exponas*, must be offered. To this opinion of the court the plaintiff excepted. The plaintiffs then to maintain the issue on their part, further offered in evidence, in addition to the evidence contained in the first bill of exceptions, the schedule returned by the sheriff, with the said writ of *fieri facias*, which appeared to be a schedule and appraisement of the same land sold by the sheriff, but which schedule and appraisement appeared to have been made by the former sheriff of the county, upon taking the said land to satisfy officer's fees, due by the defendant in the said judgment; and the plaintiff proved by the clerk of the court, that the schedule was found in the *fieri facias*, and that no other was returned with it, and that it was the schedule upon which the said writ of *venditioni exponas* issued. Upon this evidence, the defendants prayed the opinion of the court and their direction to the jury, that the said return and schedule were not sufficient evidence of a seizure by the sheriff of the property mentioned in the said schedule, under the said *fieri facias*. The court were of that opinion, and instructed the jury accordingly. To this opinion and direction the plaintiff also excepted. The plaintiff, in addition to the evidence contained in the preceding bills of exceptions, offered in evidence to the jury, a deed from the sheriff, reciting the *fieri facias*, *venditioni exponas*, seizure and sale of the land to the purchaser, for the purpose of proving the seizure and sale of the property therein mentioned, by virtue of the said writ of *fieri facias*, and *venditioni exponas*. Whereupon the defendants by their counsel objected to the recitals in the said deed, and prayed the opinion of the court, and their direction to the jury, that the said deed, and other testimony given in the cause, are not sufficient evidence of the laying of the *fieri facias* upon the premi-

Estep and Hall's Lessee *vs.* Weems, *et al.*—1834.

ses in question, to entitle the plaintiffs to recover in this action; which instruction the court gave accordingly.

The questions arising in the case are of considerable importance, as they involve the security and stability of titles of real estate acquired by purchasers at sheriffs' sales. Upon the best consideration we have been able to give to the subject, after an examination of the adjudications of the courts of this State and elsewhere, we have come to the conclusion that the opinion of the court below cannot be sustained upon either exception.

We do not think that it is essentially necessary in an action of ejectment, brought by a purchaser to recover the possession of land purchased by him at a sheriff's sale, to prove a *seizure* of the land by the sheriff for the purpose of validating or supporting his title. The establishment of such a principle, would go far indeed to deter persons from becoming purchasers at such sales, and would operate much to the injury and obstruction of the administration of justice, in preventing creditors from obtaining the fruits of their judgments. It has been more than once solemnly decided by this court, that it is *the sale* of the sheriff which vests the title in the purchaser, which sale must be proved either by a deed, the sheriff's return, or by some note or memorandum in writing, in order to comply with the requisitions of the statute of frauds and perjuries. No case which we have been able to find seems to give the least countenance to the idea, that he has any thing to do with the legality or regularity of the previous seizure after his title acquired by the sale has been consummated by a deed from the sheriff. Indeed this court have said in 5 *Harr. and Johns.* 226, that the legal estate is transferred by the sale of the sheriff to the vendee by operation of law, and that a deed from the sheriff to the vendee, although frequently taken out of abundant caution as an additional evidence of title, is not necessary to vest the legal estate in him. The same principle is recognized by this court in 6 *Harr. and Johns.* 204, where they say, "It is true that the return does not set out the name of the purcha-

ser, and that no description is given of the property sold, for which reason it might perhaps have been set aside on motion. But it is not the return of the officer that gives title to the purchaser, but the previous sale; and it would be of dangerous consequences to *bona fide* purchasers, if, after having paid their money for property sold under competent and legal authority, they should be at the mercy of officers who might make imperfect returns of executions, or if they pleased make no returns at all. But a sheriff's sale of lands being within the statute of frauds, some memorandum in writing is necessary to be made. It is therefore always right and proper for the security and protection of purchasers, that in addition to a deed for the land sold, there should be a special return of the execution, particularly describing the premises, and setting out the name of the purchaser, either of which though not operating to pass the title, would be safe and competent evidence of the sale. In this case the sale by the *Marshall* was of the specific property condemned according to the act of assembly, for which he passed his deed to the lessor of the plaintiff, containing a sufficient description of the premises sold.

According to the principle sanctioned by this decision, the deed in this case offered in evidence, fully performed its office, for it contains a minute and particular description of the property sold under the execution, and was therefore legal and competent evidence of the sale, and passed the title. In 1 *Harr. and Gill* the same doctrine is held. The court there say, "In an ejectment by a purchaser under a sheriff's sale against the debtor, who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment, the *fieri facias*, and to prove the sale of the land, which may be done either by a deed from the sheriff, or a return to the *fieri facias*; and if these proceedings are correct they are sufficient to entitle him to recover. In the absence of a deed from the sheriff, and his return to the execution, a memorandum in writing of the sale must be produced to take the case out of the statute of frauds." In 1 *Gill and Johns*. 443, this court also decided, that an imperfect descrip-

Estep and Hall's Lessee vs. Weems, *et al* —1834.

tion of the property contained in the schedule may be corrected and cured by the sheriff's return of the sale made by him, and that a purchaser at such sale has a right to resort to the whole judicial proceedings to prove and ascertain his title. *The venditioni exponas* in this case having described the land with sufficient certainty and precision, and the sheriff having executed a deed to the purchaser, who was the highest bidder, conveying the land sold to him, it seems to follow from the principles contained in this decision, that the land sold was sufficiently ascertained and identified, notwithstanding any defect or informality which might appear upon the face of the schedule, and that the sale so made was sufficient to pass the title to the purchaser, of which sale the deed offered in evidence was competent and admissible proof, and ought not to have been rejected by the court. The principles established by the decisions of our own court upon this subject, are in perfect accordance with those contained in the decision of the court of one of our sister states. 1 *Johns. Cases*, 155. *Colman and Cain's Cases*, 350. From the principles established by the preceding authorities we think the proof of legal seizure is not an essential ingredient in the title of the purchaser at a sheriff's sale, to enable him to recover the land purchased, in ejectment; and that the several opinions given by the court below were incorrect in rejecting the evidence of title offered by the plaintiffs, upon the hypothesis that proof of seizure was necessary to render the evidence admissible, and to entitle the plaintiff to recover.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Susanna J. Gott and Wilson vs. Ann Carr.—1834.

SUSANNA J. GOTT and JOHN F. WILSON vs. ANN CARR.—
December, 1834.

If a defendant having the means of defence in his power, in an action against him in a competent tribunal, neglects to use them, and suffers a recovery to be had against him, he is precluded from obtaining relief in Chancery in relation to the same matter.

The cases in which Chancery furnishes relief against recoveries suffered to be had at law, are exceptions to the preceding rule.

A court of equity will not relieve against a recovery, in a trial at law, unless the justice of the verdict can be impeached by facts, or on grounds, of which the party seeking the aid in Chancery, could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party unmixed with any negligence or fault on his own part. And it will only sustain a bill invoking its aid, upon some new matter of equity not arising in the former case, or seeking some relief to which the powers of the court of law were not fully adequate.

Chancery will not relieve after a recovery at law, upon testimony which with due care and diligence the party might have procured, or had the benefit of upon the trial at law, nor upon the ground that a witness was guilty of perjury.

Under the act of 1791, *ch. 68, sec. 4*, upon the trial of appeals from the judgments of magistrates, the county courts do not act purely as courts of law, but according to the equity and right of the matter, and hence will inquire into the want of consideration in a single bill, if that be insisted upon as a defence to a suit originating before a justice of the peace.

The county courts have concurrent jurisdiction with Chancery in questions of fraud.

A new trial will not be granted merely for the purpose of giving to a party the opportunity of impeaching the testimony of a witness.

A suitor in court is bound to be present in court in person or by attorney, to take care of his rights, and attend to their due prosecution, and cannot make the omission to perform this duty, of itself, the foundation of an injunction.

APPEAL from the court of Chancery.

The appellee on the 20th of November, 1830, exhibited her bill in the court of Chancery, against the present appellants, asking to be relieved by injunction, from the operation of three judgments in favor of the appellant *Gott*, rendered by *Anne Arundel* county court, upon appeals from the judgments of a justice of the peace.

The circumstances upon which the opinion of this court turned, are sufficiently stated in the opinion delivered by his honor the chief judge.

Bland, Chancellor, at March term, 1833, perpetuated the injunction, and decreed the appellee her costs, upon the ground, that the single bills, on which the judgments were rendered against her, were fraudulently obtained, and that she could in no way so effectually avoid being made the victim of the fraud, as by seeking protection in a court of equity. From this decree the defendants appealed to the court of Appeals.

The cause came on to be argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

Pinckney, for the appellants, contended.

1. That there is no case disclosed in the bill, to authorize the granting of an injunction to stay proceedings on the judgments mentioned in the bill. The grounds relied upon would have constituted a defence at law, and it was the duty of the appellee to have urged them in the county court. The witness upon whose testimony the cases are alleged to have been defeated before the magistrate, does not appear to have been summoned, nor is any sufficient reason assigned for the absence of the appellee when the trials were had in the county court. If she had been present in person, or by an agent or attorney, and due diligence had been employed to procure the attendance of the witness, the cases might have been continued by affidavit, and his evidence procured at a subsequent period. When a party has a good defence at law, and omits to make it, he cannot afterwards upon the same ground have relief in equity. 1 *Johns. Ch. R.* 320, 432, 98. 3 *Ib.* 356. 7 *Cranch.* 336. 1 *Johns. Cas.* 346. 1 *Harr. and Johns.* 398. 2 *Harr. and Johns.* 179, 487. 3 *Ib.* 568.

2. If the answer of the plaintiff at law was necessary to render the defence available there, a bill for a discovery

Susanna J. Gott and Wilson vs. Ann Carr.—1834.

should have been filed preparatory to the trial. 3 *Johns. Ch. R.* 355. 1 *Vernon*, 176.

3. There is not sufficient proof to establish the fraud, if that question should be examinable.

Randall, for the appellee.

1. The judgments enjoined by the Chancellor, were not rendered upon proceedings originating in the county court, but on appeals from a magistrate's decision, which according to the practice, are all tried on the same day, and confusedly. Parties to such cases have not the same notice as in cases regularly and ordinarily on the county court docket; nor are the proceedings characterized with the same regularity and precision. The complainant could not have anticipated that *Wilson*, charged to be interested, would be offered as a witness; nor could she have foreknown the necessity of appealing to the conscience of the appellants. There is no proof in this case, that the appellee had an opportunity of defending herself at law, upon the grounds of relief relied upon here; and although the answer details those circumstances, it does not set them up as constituting a bar to equitable relief, without which the objection cannot be made. 1 *Harr. and Gill*, 220. 4 *Gill and Johns*. 438. 2 *Ib.* 14. 2 *Johns. Ch. R.* 339. 14 *Ves.* 214.

2. But the rule, that a party shall not be relieved in equity upon grounds of which he might have availed himself in the court of law, is not universal, and inflexible. *West and Beans*, 3 *Harr. and Johns*. 568. 2 *Johns. Ch. R.* 512. 6 *Ib.* 479. 2 *Pr. Wms.* 424. 2 *Ves. Jr.* 135. 12 *Ves.* 219.

3. The proof of fraud and unfair dealing, in obtaining the single bills from the appellee is abundant, and fully justifies the decree of the Chancellor, if the examination of it is not precluded by the judgments of the county court.

BUCHANAN, Ch. J., delivered the opinion of the court.

The questions presented for the consideration of the

court, are. 1st. Do the judgments at law in favor of the appellant, *Susanna J. Gott*, bar the defendant from maintaining this suit? 2nd. If they do not, is the defendant, upon the case made by the bill and answers, and the proof taken in the cause, entitled to a perpetual injunction of those judgments?

1. As to the preliminary question. It is a salutary principle of law, that every person is bound to take care of and protect his own rights and interests and to vindicate them in due season, and in the proper place. And that if a defendant having the means of defence in his power in an action against him, in a competent tribunal, neglects to use them, and suffers a recovery to be had against him, he is forever precluded from obtaining relief in Chancery, in relation to the same matter. The application of this principle may not be universal; but the cases in which Chancery will furnish relief against recoveries suffered to be had at law, are exceptions. The well settled general rule being, that a court of equity will not relieve against a recovery in a trial at law, unless the justice of the verdict can be impeached by facts, or on grounds, of which the party seeking the aid of Chancery, could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with any negligence or fault on his own part.

And Chancery will only sustain a bill invoking its aid, upon some new matter of equity, not arising in the former case; or seeking some relief, to which the powers of the court of law were not fully adequate.

It is a sound and useful rule in the administration of justice, for the prevention of negligence, and harrassing and protracted litigation, and the consequent burdensome accumulation of costs. A material departure from, or relaxation of which, would prove vexatious in practice, and be felt as a public grievance, by the great delays, and sometimes abuse of justice, to which it would lead. The effect might often be, to prevent the prosecution of a

Susanna J. Gott and Wilson vs. Ann Carr.—1834.

just claim, by an injured and oppressed party, for the want of adequate means to pursue it through a protracted litigation, with a more fortunate adversary, whose object was delay, when the unavoidable expenses of the controversy would sometimes exceed the amount in dispute; and when, although he should ultimately succeed, his success might in effect prove a loss, or come too late to be of much service. Applying then, that rule to this case, which we think is clearly within it, it appears to us, that whatever may in truth be its abstract merits, it is not a case for the interposition of Chancery, and that the injunction ought not to have been granted, or being granted, should not have been perpetuated.

The suits at law were originally before a justice of the peace, on warrants issued upon three notes given by the appellee, on which judgments were rendered against the present appellant, *Susanna J. Gott*, (then plaintiff) from which judgments she appealed to the county court, where the judgments were reversed, and judgments given, under the provisions of the act of Assembly, for the appellant for the amount claimed. Whereupon, this bill was filed for an injunction to prevent execution upon those judgments, which was granted, and finally perpetuated by the Chancellor. The grounds of relief alleged in the bill, are threats and fraud in procuring the notes by the agent of the appellant, *Susanna J. Gott*, and that the judgments rendered in the county court, were given in consequence of the absence, by sickness, of a witness, on whose testimony the judgments by the magistrate were given, and that want of the necessary affidavit for the continuance of the cases occasioned by the absence of the appellee, for which no sufficient reason is assigned; in consequence, also, of her alleged inability, to prove in a court of law the want of consideration for the notes, they being under seal, and that the judgments of the court were founded upon the testimony of *John F. Wilson*, who is stated to have been interested in the event of the suits, but

Susanna J. Gott and Wilson vs. Ann Carr.—1834.

who does not appear to have had the slightest interest. And all fraud is denied in the answer.

As to the alleged absence of a witness, it is a settled doctrine, that Chancery will not relieve after a recovery at law, upon testimony, which with due care and diligence the party might have procured, and had the benefit of upon the trial at law. Here it is evident, that the appellee did not use due diligence, or such means as were in her power, to establish the threats and fraud, which are alleged as a ground of the relief she seeks.

The testimony that is now produced, it was equally in her power, then, as now, to have had the benefit of, with proper efforts to obtain it, for any thing appearing to the contrary.

The material witness stated to have been absent by sickness, was known to her to be such. Indeed it is alleged in the bill, that the judgments by the magistrate were founded upon her testimony. No reasonable and proper endeavors were made to procure her evidence; it does not appear, that a *subpœna* had been issued for her, or that an affidavit had been made for the continuance of the cases for the want of her testimony, or any other effort to obtain a continuance. If proper steps had been taken to procure the attendance of the witness, and obtain her testimony, accompanied by the necessary affidavit for that purpose, the cases might have been continued, and the benefit of the testimony of that witness secured. Her own absence from the court when the cases were tried, is no sufficient excuse; but was of itself an act of negligence. She should have been present in person, or agent, or by her attorney, to take care of her rights, and cause the proper defence to have been made, or the necessary steps taken to procure the benefit of the very testimony she now relies upon to sustain the allegation of fraud, and of which she had full knowledge at the time. As to the allegation of inability to prove in a court of law, the want of consideration for the notes, the only evidence now relied upon to prove the want of consideration, is that

Susanna J. Gott and Wilson vs. Ann Carr.—1834.

which is now insisted upon to sustain the allegation of fraud in obtaining the notes, and which, if it had been offered at the trials in the county court, must have been received. The county courts having concurrent jurisdiction with Chancery, in questions of fraud. And being moreover required by the act of 1791, *ch. 68, sec. 4*, in cases of appeal from the judgments of magistrates, "*to determine according to the law of the land, and the equity and right of the matter, upon the petition of the appellant, and the proof of both parties,*" and therefore not acting in such cases purely as courts of law.

With respect to the other allegation, that the judgments of the county court were rendered upon the testimony of *John F. Wilson*, who is stated to have been interested in the event of the suits, (but who, as before observed, does not appear to have had any interest,) if the object be to fix upon him the imputation of perjury as a ground of relief, it is a purpose, for the accomplishment of which, Chancery will not lend its aid.

The appellee should not have gone to trial unprepared.

It is a general rule at law, that a new trial is not to be granted merely for the purpose of giving to a party the opportunity of impeaching the testimony of a witness; and Chancery acting upon that principle, will not interfere after a recovery suffered at law, to give relief on that ground. And no fraud in obtaining the judgments is alleged, or attempted to be proved. This view of the subject puts an end to the cause. It is not necessary, therefore, to inquire, what would be the effect of the proof taken, if it was a case proper for the interposition of Chancery.

DECREE REVERSED, AND BILL DISMISSED WITH COSTS.

Elizabeth Lee vs. Lee and Welch.—1834.

ELIZABETH LEE vs. STEPHEN LEE, AND ROBERT WELCH
OF BEN.—*December, 1834.*

An executor in finishing the growing crops of the deceased, is not bound to discharge the duties of an overseer. He may employ and pay out of the assets in his hands, as many overseers as are necessary for the completion and preservation of the crops. If with more advantage to the estate he acts in the capacity of an overseer himself, it is competent for the Orphans court to allow him a reasonable compensation for his services.

When a claim of an executor for compensation for services rendered the deceased's estate as overseer after the testator's death, is contested before payment, its passage by the Orphans court is no evidence of its correctness. It must then be supported by testimony, substantially sufficient to establish the facts before a jury.

No action will lie to recover compensation for services performed, where with a view to a voluntary legacy, the services were rendered by the plaintiff without any expectation of being paid the value thereof, or any promise of remuneration, expressed or implied.

When there were two joint executors, and the will as to one of them, declared that he should not be allowed any commission as executor, in consideration of the provision made for him in the will, the Orphans court cannot allow more than one half of the *maximum* rate of commission to the other executor.

CROSS APPEALS from the Orphans court of *Anne Arundel* county.

A petition was filed by *Elizabeth Lee* in the Orphans court of *Anne Arundel* county, on the 16th of September, 1834, representing that her husband *Stephen Lee*, died in the month of January, 1833, leaving a considerable real and personal estate, the whole of which he devised and bequeathed to her during her single life, subject to the payment of certain legacies out of the profits thereof.

That by a codicil to his will, he appointed the appellees, his executors, with a direction, that one of them (*Lee*) should not be allowed any commission as such, in consideration of the provision made for him by the will. The petitioner then complains of two allowances made to the executors in their final account. One for the sum of \$961 43, and the other for 350 18, both retained by the executor *Lee*, as debts due him individually, from the estate of the said testator.

She charges the same to be improper allowances, and prays that the accounts may be re-examined, and the objectionable credit stricken out.

The defendants by their answer, admit the death, and the disposition of the testator's estate, as alleged in the petition, and state that the credits objected to by the petitioner are for claims due the defendant *Lee*. The first for \$961 43, for services rendered the testator in his life-time, in the superintendence of his farms, from August, 1826, to the period of his death, in January, 1833, at the rate of \$150 per annum. The other for \$350 18, being for services rendered and expenses incurred by the same party, in the cultivation and preservation of the crops made on the testator's farms in 1833, the year he died. The answer insisted that the services were fairly worth the money charged, and that the accounts have been passed by the court, and are still due. After some depositions had been taken, and filed by the parties, the Orphans court, on the 7th of October, 1834, passed their order rejecting the larger claim, for services rendered in the testator's life-time, upon the ground that the proof did not support it; but admitting the smaller claim, as a reasonable compensation for the management of the estate of the testator the year of his death.

The court also directed that the executor, *Welch*, be allowed a commission of *eight per cent.* on the inventory, and *five per cent.* on the amount of debts due the estate, and collected by the executors; the proof being, as alleged by the court in their order, that the settlement of the estate had principally devolved on said *Welch*.

An account was stated by the register in conformity with this order; the exceptions to which, were afterwards, on the 25th of November, 1834, overruled, and the account ratified and passed.

The appellant, *Elizabeth Lee*, appealed from the allowance of the item of \$350 18, to the executor, *Stephen L. Lee*, who appealed from the disallowance of his claim for \$961 43; and both the said parties appealed from the allow-

ance of the commissioners to the executor, *Robert Welch of Ben.*

The cause came on to be argued before BUCHANAN, Ch. J., and STEPHEN, DORSEY, and CHAMBERS, J's.

Pinkney, for *Elizabeth Lee*, contended,

1st. That by the true construction of the will, the executor, *Stephen L. Lee*, is not entitled to charge for any services rendered by him as executor.

2d. That he cannot charge for attending the crops growing at the time of the testator's death. Act of 1798, *ch. 101, sub-ch. 6, sec. 12.*

3d. That *Robert Welch of Ben.*, the other executor is only entitled to half the commission to which the executors would have been entitled in the absence of that clause in the will excluding the other executor. 2 *Strange*, 728.

4th. That the claim for \$950 was properly rejected, the proof being, that the claimant rendered the alleged services with a view to satisfaction by legacy, or testamentary provision, and not to compensation in wages. 7 *Ves.* 261.

Alexander, for *Welch*, contended,

1st. That the Orphans court did right in allowing *Welch* a commission proportioned to the value of the services rendered by him, as one of the executors.

2d. That the propriety of the particular allowance made to this executor (being within the limits prescribed by law) is not a subject proper to be inquired into by this court. 1 *Peters*, 565. 4 *Harr. and Johns.* 12, 275. 1 *Harr. and Gill.* 84, 4 *Gill and Johns.* 460.

3d. That if the Orphans court erred in apportioning the commission to each executor, according to the degree of care and diligence bestowed by each in the execution of his trust, then a like error has been committed in allowing to *Stephen L. Lee*, the other executor, the whole of the compensation for securing the crop; and the accounts ought to be correct-

ed, by allowing to the appellee a moiety of the sum allowed for securing the crop, and five per cent. on the inventory.

Randall, for *Stephen L. Lee*, insisted,

1st. That the claim for services rendered the testator during his life-time, should have been allowed, as the fact of their rendition and value was proved, and an express contract to support the claim is not required. The act of 1798, *ch. 101, sub-ch. 8, sec. 19*, places the claims of executors and others upon the same footing. These services were rendered with the knowledge and consent of the testator, and an express contract for compensation was not necessary. 3 *Johns. Rep.* 199. They were not designed as a mere courtesy, but were rendered with a view to compensation, and will support an *assumpsit*. 2 *Com. Con.* 406. 1 *Esp. Rep.* 189. 4 *Dallas*, 111, 130. 1 *Yates' Rep.* 209. 13 *Johns. Rep.* 380. 4 *Yates*, 354. The legacy will not be regarded as a satisfaction of the debt, the leaning of the courts is against that, unless the intention is perfectly manifest. 1 *Pr. Wms.* 410. 3 *Ves.* 466.

2. The claim for services rendered subsequent to the death of the testator, in securing the crops, the proceeds of which contributed to swell the estate, is clearly admissible, independently of the action of the Orphans court, by whom the account has been examined and directed to be paid.

3. The allowance to *Welch* is erroneous, as it exceeds the one-half of the *maximum*, of the commission to which executors and administrators are entitled; it having been the design of the testator, in excluding *Lee* from commissions, that his half should fall into the *residuum* of the estate.

DORSEY, J. delivered the opinion of the court.

An agreement having been filed by the parties, that the record be so amended as to remove all objection as to the time and manner of taking the appeal; the only question before us is, did the Orphans court err in ordering their register to credit *Stephen Lee*, with his account of \$350 18, exhibit-

Elizabeth Lee vs. Lee and Welch.—1834.

ed in the record of the proceedings in this case. It has been argued on both sides, as if this account presented a claim for services rendered in finishing and securing the growing crop on the lands of the testator at the time of his death. And it is resisted on the part of the appellant, on the ground that it was the duty of the executors to finish the crop begun by the deceased, and that the Orphans court are not authorised to allow them, or either of them any compensation for their personal services, otherwise than as they are compensated in their allowance of commission.

In this resistance, on the ground on which it has been made, we cannot agree with the appellant. An executor in finishing the crop of the deceased, is not bound to discharge the duties of an overseer. To impose on him such a duty, would be virtually, to exclude from that office most persons whose services it would be desirable to engage in that capacity. Suppose the deceased was the owner of many farms, and in different sections of the State, on all of which valuable crops were growing, which it was the interest of the estate that the executor should complete; is he bound, should it be practicable, to officiate as an overseer on every farm? Certainly not. No duties so unreasonable are imposed on him by the law. He may employ and pay out of the assets in his hands as many overseers as are necessary for the completion and preservation of the crops. If with more advantage to the estate, he acts in the capacity of an overseer, himself, it is competent for the Orphans court to allow him a reasonable compensation for his services. But the present claim appears before us under circumstances which enlist for it no favorable consideration from the court. The executor according to an account filed with that now under examination, claims from his father's estate \$961 43, for wages as overseer from the 28th of August, 1826, to 25th of January, 1833, at \$150 per annum. But as overseer from his father's death, on the 26th of January, 1833, to the 31st of December, 1833, he charges \$300.

Thus claiming for his services for eleven months and five days, as much as he had ever done before for two years' discharge of the same duties. And these services it is contended, we ought to presume were rendered in finishing a crop begun before the 25th of January, 1833. Of what could the crop in the nature of things have consisted? Why of wheat and rye sown in the fall of 1832, and which an overseer should have had ready for market before the 1st of October, 1833. The appellee, *Lee*, then calls on us to allow him for about eight months' service, or rather for three months, (for until the rye and wheat were fit for harvesting, no overseer was necessary,) *three hundred dollars*, when as appears by the proof, he could find no human being, who could say, that at any antecedent period of his life, his services for a year were worth more than \$150. Ought we under such circumstances to be asked to give our sanction to such a claim? But an insuperable obstacle to our allowance of any claim for such services is, that it no where appears upon the record, that the testator left any growing crop. And if it were otherwise, no matter what may have been the growing crop, an insurmountable objection to any allowance presents itself, in the utter absence of any *scintilla* of proof to sustain it. The claim having been contested before payment, its passage by the Orphans court is no evidence of its correctness. It must be supported by testimony substantially sufficient for its establishment before a jury. On this occasion no evidence of any kind was offered. And an inspection of the account itself, and the answer of the appellee, conclusively demonstrate, that there exists no such claim against the estate of the deceased. It was for services as overseer after the death of the testator.

So much of the decree of the Orphans court of the 7th of October, 1834, is reversed, as directs a credit of \$350 10, to be allowed to the executors in their account.

Upon the appeal of *Stephen L. Lee*, the only question presented is, as to the propriety of the order of the Orphans court in rejecting the claim of *Stephen L. Lee*, for \$961 43, for

Elizabeth Lee vs. Lee and Welch.—1834.

services rendered to his father in his life-time. The account has passed the Orphans court upon the affidavit of the claimant alone; but this adds nothing to its intrinsic merits or authenticity, when reviewed as it was by the Orphans court, upon the proceedings before it. It is a claim made by a son on the estate of a deceased father, "for working on, and superintending his farms" for six years, four months, and twenty-seven days, at \$150 per annum; the full value of the son's service according to the testimony of all the witnesses. No credit of any nature or description is given on this account, and it is a fact admitted in the cause, that although the appellant charged for his services from the 28th of August, 1826, down to his father's death, yet that he did not arrive at age until the 17th of November, 1827. It is in proof by a competent witness, that *Stephen L. Lee*, told him some years before his father's death, "that he got whatever money he wanted from *Mr. Owens*, his father's agent in *Baltimore*." These circumstances, when viewed in connexion, cast a shade of suspicion over the claim, which should impel the court to regard it with the eye of scrutiny and suspicion. In the absence then of all proof that the father, ever by word or deed, promised or held forth an expectation to his son, that he would compensate him for his service, or that the son ever intimated to the father, or any body else, that he intended to claim such compensation, are we at liberty to conclude, that there existed between them a contract for that purpose, either express or implied? When it is expressly proved by the son's own declarations, that he had made no contract with his father, but looked to his father's will, as the source whence his compensation was to flow. It is a case, which to the letter comes within the familiar principles stated by *Ld. Kenyon* in 1 *Esp. Rep.* 108, *Le Sage vs. Consmaker and others, Executors*, that if the services were rendered by the plaintiff "without any view to a reward, but with a view to a legacy, that he could not set up any demand against the testator's estate." The authorities referred to by the appellant's counsel do not impugn the principle upon which

the order of the Orphans court rests for its support. They were cases, where there either was an express promise of reward, or facts from which the promise might be implied. Here no such facts are to be found; and the case therefore comes completely within the well established principle of the law, that no action will lie to recover compensation for services preformed, where with a view to a voluntary legacy the services were rendered by the plaintiff without any expectation of being paid the value thereof, or any promise of remuneration, express or implied.

The order of the Orphans court, so far as concerns the subject matter of this appeal, is affirmed with costs.

On the appeal of *Elizabeth Lee*, and *Stephen L. Lee*, against *Robert Welsh of Ben*, the court decreed that so much of the order of the Orphans court as allowed to the said *Welsh* a commission of eight per cent. on the inventory, be reversed with costs, and the record was remanded to the Orphans court, with directions to have the account stated accordingly.

CRAWFORDS and SELLMAN vs. ROBERT TAYLOR, Trustee
of FORD, et al.—December, 1834.

Under the insolvent laws of this State, the intent to give an undue preference by a debtor making a transfer of his property to a creditor or surety, is to be considered as subject to the distinctions which have obtained under the bankrupt laws of *England*, between a voluntary and involuntary transfer; and therefore to avoid a transfer under our system, it will be necessary to establish, that the debtor made the transfer with a view or expectation of taking the benefit of the insolvent law, and also that he voluntarily made the transfer sought to be vacated.

That transfer is not considered voluntary which is made to a creditor demanding payment, although the debt is not due at the time the transfer was made. The creditor is entitled to use vigilance, and obtain security, as well before, as after the debt is payable.

APPEAL from the court of Chancery.

Bills were filed on the 8th of January, the 22d of April, and the 13th July, 1831, by the appellee, *Taylor*, as per-

manent trustee of *Stephen H. Ford*, an insolvent petitioner, and others of *Ford's* creditors, against himself and *Hugh* and *William Crawford*, *James C. Sellman*, *John Franciscus*, and the *Commercial and Farmer's Bank of Baltimore*, for the purpose of setting aside certain conveyances and assignments to them, and placing the property and funds so conveyed and assigned in the hands of *Taylor*, the trustee, for distribution among the creditors, under the insolvent laws. The decree of the Chancellor, passed after the consolidation of the cases, was acquiesced in by *Ford*, *Franciscus* and the *Bank*.

The bill against the *Crawfords* (and the statements in the bill against *Sellman* are substantially the same) alleged; that *Ford* became insolvent and unable to pay his debts, about the 17th of May, 1830, and had then reason to believe, and did believe, that he would be compelled to take the benefit of the insolvent laws, unless he could get a discharge from his creditors, upon a surrender to them of his property. That being thus insolvent and unable to pay his debts, and expecting to be driven to the insolvent laws for relief, he did transfer and assign to the defendants, the *Crawfords*, in satisfaction of their claim against him, a large quantity of merchandize, and a considerable amount of notes and other evidences of debt. That said property and funds were transferred to the defendants, before their claims against the said *Ford* were due, and of his own mere motion, without solicitation or application to him by them; and that said transfers and assignments were made with a view, or under an expectation of being, or becoming, an insolvent debtor, and with an intent thereby to give an undue and improper preference to the said *Crawfords*;—that he actually applied for the benefit of the insolvent laws, on the 5th January, 1830. And they pray that the transfers and assignments so made, may be vacated, and the property and funds paid over to *Taylor*, the trustee, to be appropriated under the provisions of the insolvent laws.

The answers of the *Crawfords* and *Ford*, admitted his application for the insolvent laws at the time stated; and that on the 17th of May, 1830, as alleged, he sold and transferred to them, merchandize and funds in satisfaction of a claim against him, due the said *Crawfords*, for moneys advanced to him by them, and endorsements which they had made on his account, and in regard to which he had pledged himself at the time of the advances, &c. that they should in no event sustain any loss. They deny, that at the time these sales and transfers were made, *Ford* had discovered himself to be unable to pay his debts, or that they were made in contemplation of an application for the benefit of the insolvent laws, and with intent thereby to give an undue and improper preference to the said *Crawfords*. On the contrary *Ford* alleged, that he was then perfectly satisfied, that his business could be arranged, without recourse to such an expedient. The answer of *Ford* further stated, that in the fall of the year 1829, when his affairs were embarrassed, he was enabled to continue his business by the timely assistance of the *Crawfords*. The answers further stated, that the before mentioned sale and transfers, were made at the instance of the *Crawfords*, who state that they were constantly pressing for the payment of their cash advances and endorsements. That they received nothing on account of a balance due them by *Ford*, for merchandize previously sold him; and that the goods obtained from him were credited at the prices he paid for them. That the claim due the *Crawfords* was evidenced for the most part by promissory notes, which being renewals of others previously given, were not all due and payable at the time of the sale and transfers.

The proof taken under the commission, which is voluminous, is omitted, being as the reporters suppose sufficiently adverted to by the learned judge who delivered the opinion of this court.

Bland, (Chancellor,) on the 2d of January, 1833, declared the transfers and assignments to the *Crawfords* and

Crawfords and Sellman vs. Taylor.—1834.

Sellman to be absolutely null and void, and that the title to the property so transferred and assigned, be vested in the trustee, *Taylor*; and that an account be stated by the auditor, &c. The account was accordingly stated, and duly ratified and confirmed by the Chancellor's order of the 24th of May, 1833, and the amount thus ascertained to be due, the trustee directed to be paid with costs. From these decrees an appeal was prosecuted by the *Crawfords* and *Sellman* to the court of Appeals.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

Johnson and *Kennedy*, for the appellants.

1. The question to be decided by this court is, whether the transfers were made in contemplation of insolvency, and for the purpose of giving the appellants an undue preference. It is incumbent on the complainant to show, not only that *Ford* was insolvent in fact, but that he intended at the time to take the benefit of the insolvent laws, and the allegation of the bill in that particular, is expressly denied by the answers.

In reference to the questions involved in this case, the principles and decisions upon the bankrupt laws of *England*, and the bankrupt law of the *United States*, of 1800, are applicable to our insolvent system. The bankrupt laws of neither country in terms declare preferences void, but the courts have annulled them as a fraud upon the system, if voluntarily made by the debtor. The policy of the laws in such cases is regarded as invaded. But the same consequences cannot result from an involuntary and coerced preference, brought about by the threats or pressure of the creditor. When the Legislature of *Maryland* was dealing with this subject, they knew the judicial construction of the *English* and *American* bankrupt laws; and with that knowledge, employing as they have done, the same language, they must be supposed to have meant the same thing.

By the act of 1805, a preference though voluntarily and unduly given was not void, though the debtor thereby forfeited the benefit of the law. It was not until the act of 1812, that such preferences were avoided. The provision in the act of 1805 is penal, and cannot be visited upon a party, for an act extorted from him by threats or coercion. Even if the preference was given, when the debtor supposed he might be compelled to petition, it would not be void, nor would he be deprived of the benefit of the laws, if made under the influence of constraint or importunities. The preferences declared void by the act of 1812, are precisely those which, by the act of 1805, would deprive the party of the benefits of the law. In *England* a preference is protected, which is the result of a mere demand by the creditor. 16 *Serg. and Low.* 88. A payment made upon compulsion, is not a voluntary preference within the meaning of our laws. *Kennedy vs. Boggs*, 5 *Harr. and Johns.* 411. *Hickley vs. Farmer's Bank*, 5 *Gill and Johns.* 381.

The cases in *England* have decided. 1. That the debt paid need not be due at the time. 2. That it is immaterial whether the debtor and creditor did, or did not know of the impending bankruptcy. 3. That no suit need be instituted or threatened, nor that the creditor should be very importunate. If the creditor demanded his money in the ordinary way of business it is sufficient. 16 *Serg. and Low.* 88. 1 *Term. Rep.* 155. 2 *Bos. and Pul.* 580. 11 *East.* 256. 1 *Camp.* 416. 5 *Johns. Rep.* 412.

The answers and proofs in this case abundantly show, that the transfers were made at the pressing solicitation of the appellant. The act of Assembly cannot mean that all payments and preferences shall be void, which are made by a debtor in contemplation of the *mere probability* of taking the benefit of the insolvent laws; because, if that be the rule, then every payment made by a party in insolvent circumstances would be void, as in that case, the subject of such a necessity must occupy his thoughts. 1 *Saund. Pl. and Ev.* 231. 5 *Taunt.* 539. 7 *East.* 544. 3 *Ves.* 87.

To avoid the preference, it is not enough that he thinks he may become an insolvent petitioner, but that such *will* be the case. It might well be argued, that preferences are good in this country, which would not be protected in *England*; as there a man may be declared a bankrupt against his consent, which is not the case in reference to our insolvent system, to which no man against his will can be compelled to resort.

Mayer and Gill, for the appellees.

1. The act of 1812, *ch. 77*, re-enacted by the act of 1816, *ch. 221*, makes all sales, transfers, &c. void, made with a view to give an improper preference, and in contemplation of insolvency. These are questions of fact, and the Chancellor is to be governed by the same circumstances, and to make the same inferences as would be made by a jury.

2. In reference to the liability of the appellant, it is wholly immaterial whether *Ford* purchased the goods transferred to them, for the purpose of doing so or not. If when the transfers were made he knew he must fail, and handed the goods over to them, to give them an improper preference, contemplating at the time having recourse to the insolvent laws, such transfer is void. The circumstance that the claim of the appellants is for money loaned, does not entitle it to more favor; because it was by means of these very loans that *Ford's* credit was sustained, and the public imposed on; and to reward them, would be most unjust to the other creditors, who became such in consequence of deceptive appearances which they enabled *Ford* to assume. But in a court of equity, where equality is equity, debts for money loaned and goods sold, are placed upon the same footing.

To defeat a transfer to a favored creditor, it is not necessary that the debtor should have absolutely made up his mind to take the benefit of the insolvent laws. If he contemplate such a course, the transfer is void. 6 *Serg. and Low. 88*. In *England* a preference is good when made

exclusively under the importunities of the creditor, and without the volition of the debtor. But in this case it appears from *Ford's* answer, that he always intended to prefer these creditors, and the application by them therefore, though it fixed the time when the act was done, was not the only inducement which prompted him to do it. If a design to prefer is apparent, it is voluntary, and therefore void, though the creditor may have applied for it. 2 *Bos. and Pul.* 582. 1 *Stark. Rep.* 89. 2 *Bos. and Pul.* 283. 11 *East.* 256. 7 *Ib.* 544. 2 *Cowp.* 634. 3 *Mass. Rep.* 325. That cannot be considered an involuntary preference of one creditor, which would not have been given to another upon a similar application; and it is manifest from the facts in this case, that the other creditors could not have got a preference, by pursuing the course adopted by the *Crawfords* and *Sellman*. The circumstance that the creditor made application, does not *per se* and *proprio vigore* legalize the preference. It may be evidence to support it; but still there may be other circumstances to show the preference to be the spontaneous favor of the debtor. Our insolvent laws look to the equal distribution of the funds of the insolvent among his creditors, and forbid the debtor under the circumstances there enumerated, from paying one creditor at the expense of the rest.

CHAMBERS, J., delivered the opinion of the court.

The appeal from the decision of the Chancellor in these cases, is prosecuted by three of the defendants below, *Hugh* and *William Crawford*, and *James C. Sellman*, and seeks to reverse the decree of the 2d of January, 1833, the report of the auditor, and the order ratifying that report.

The cases were consolidated by an order of the Chancellor, and so far as the decree affects the other parties, *Ford*, *Franciscus*, and the *Commercial and Farmers' Bank*, it has been acquiesced in. The only questions therefore for the decision of this court, are such as arise out of the transactions of *H.* and *W. Crawford*, and those of *Sellman*. The

two cases are subject to the same considerations, and the objections urged apply, if at all, with equal force to both. The slight variations in their history as detailed in the evidence, are not of a character to affect the legal principles upon which they depend.

The transfers made by *Ford* to the appellants, are charged in the bills to have been made, "with a view, or under an expectation of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference," and to be therefore void by the express provisions of the insolvent laws of this State.

The bills assert, and the argument has endeavored to establish as auxiliary propositions. That *Ford* at the date of the transfers was in fact unable to pay his debts. That he well knew his condition; and that being thus insolvent in fact, and apprised of his condition, he made the transfer without solicitation, and of his own mere motion. The testimony in the cause is submitted as establishing these allegations, and as proving also, the knowledge by the appellants of *Ford's* pecuniary situation when the property was received.

It may be conceded that the testimony does establish the fact of *Ford's* inability to discharge his debts on the 17th of May, 1830, the date of the transfers. That his property at that time was insufficient in value for that purpose. That *Ford* was perfectly informed of his insolvent condition, and that the appellants, if they did not certainly know, had every reason to apprehend, and did apprehend his embarrassments and failure. There is no ground to contend from any facts in the case, that actual fraud has been committed by the appellants and *Ford*, which exclusive of the positive provisions of the insolvent laws, will vitiate the transfers. The effort which seems to have been at one time intended to prove a secret delivery of the property, at unusual hours of the day, so as to escape observation, has altogether failed, and the nature, and amount of the claims due the appellants from *Ford*, and the full and fair value at which the property was taken, negative all idea of that kind.

The court do not perceive any difficulty in the fact, that large purchases were made by *Ford* within a short period of the transfers. The articles purchased were in the way of his trade, and as is proved, were such as persons pursuing the same business kept in store, and such as at that period of the year were usually purchased by the particular class of customers to whom he principally sold.

The ground mainly relied upon in the argument, and upon which alone any semblance of exception can be urged against the transfers is, that they are in violation of the provisions and spirit of our insolvent laws. It has been justly remarked, that these provisions have been suggested by, and adopted from the *English* bankrupt system. The foundation upon which that system rests is, that a debtor has no right to prefer one creditor to another, when he is honestly and equally bound to pay all. The courts have therefore properly adjudged, that a debtor contemplating an act of bankruptcy shall not, to gratify his personal partialities, select a favorite creditor and secure him, by an assignment of a part of his property, leaving others to share a dividend of what remains, when that favorite creditor had no higher or better claim in law or equity, than the others. But the bankrupt laws, while thus prohibiting to the debtor the voluntary preference of one creditor to another, never intended to deny to any, the advantage of an active pursuit of his claim. The maxim, "*vigilantibus, non dormientibus servat lex*," is as sound and as applicable since, as before the introduction of the bankrupt system. The voluntary assignment to a creditor has universally been considered, "an undue preference," whilst an involuntary assignment is not so. Indeed, the very terms of the rule would seem to exclude from its operation an act not voluntary, for a party cannot be said to "prefer," or "give a preference," by doing an act not the result of his own volition.

The rule therefore, which may be regarded as running through all the cases on those laws is; that a voluntary as-

signment, or an assignment with an intent to give an undue preference to a creditor, by a debtor in contemplation of bankruptcy is void. Some difference may be found to exist in the facts to which the principle of voluntary, or involuntary assignments has been applied, but the rule is distinctly recognized in all the cases. This rule is incorporated in the acts of Assembly constituting the insolvent system of this State. The act of 1812, *ch. 77*, makes void any deed, assignment, &c. to a creditor, by any person, "with a view, or under an expectation, of being or becoming an insolvent debtor, and with an intent thereby, to give an undue and improper preference to such creditor."

Former decisions in this court have concluded the question, as to the meaning and construction of the words, "insolvent debtor," here used. The case of *Hickley vs. Farmers and Merchants' Bank*, 5 *Gill and Johns*. 377, decides, according to the settled construction to which it alludes, that they mean, "taking the benefit of the insolvent laws."

If therefore, the intent to give an undue preference, is to be received as subject to the distinctions which have obtained under the bankrupt laws, between a *voluntary* and *involuntary* transfer or assignment, as we think it should, it will be necessary to the appellees to establish, that *Ford* made the transfers with a view, or expectation of taking the benefit of the insolvent laws, and also that he voluntarily made these transfers, to prefer the appellants. We do not think either of these positions are established by the facts and circumstances in the case. There is no evidence to prove, that he had the expectation of being an insolvent petitioner in point of fact. He had before been embarrassed, and had failed, without resorting to such a means of relief. He surrendered to his creditors the property which remained in his hands, and acted as if he seriously desired and expected their acquiescence to his proposed arrangement with them. He knew that such an arrangement was usual, and as his misfortunes were the result of accidents, over which he could exert no control; the failure of the

fisheries on the *Susquehanna* for several successive years, and no dishonesty or extravagance appears to be chargeable to him, we cannot adopt the suggestion of the appellee's counsel, that he could look to no other event, but to be driven to the alternative of becoming an applicant for the benefit of the insolvent laws, or of lying in jail. His examination before the commissioners has been used as evidence in this case, by consent, and denies, as his several answers to the several bills in Chancery also denies, that he had such a view or expectation, nor do we find the testimony of any witness to impeach this statement.

While pursuing his effort to obtain a release by arrangement with his creditors, he was availing himself of every means in his power, and calling upon such friends as he could enlist, to avert the proceedings of his creditors at law, and did in fact, by adjusting the most pressing demands upon him, keep himself from being taken in execution until the 1st of January following, being more than seven months after it is supposed he indulged the view and expectation of petitioning, and being also after all hope of compromise with a large part of his creditors was at an end.

Nor do we regard the transfers as voluntarily made. In the case of the *Crawfords*, the advances were made under circumstances very peculiar. At a moment of most pressing necessity, when the immediate use of money was of the last importance to his credit, and when by the testimony of two of the witnesses he could not obtain it elsewhere, he received a loan from them on the most solemn pledge, which could bind his honor and his conscience, to secure this, and all their other advances, whenever, and however they might demand. They did afterwards demand it, and were urgent and pressing for payment, and prescribed the particular mode, and the particular time for the redemption of his pledge; neither the time nor the mode, being inconsistent with his ability or his obligation. He paid them not all that he was indebted, but to the amount that he had

pledged—the amount of their loans; and paid them in goods at a fair and full value, and indeed at a price of which they complained, and at which they were not able to sell them afterwards.

In *Sellman's* case, there is no proof of such a solemn pledge previously given, but it was for a debt of precisely the same kind as *Crawford's*, and when *Sellman* insisted on being paid, as one of the witnesses has said was, “urgent and pressing for payment, or security,” he satisfied so much of *Sellman's* debt as arose from loans, in the same manner as he had satisfied *Crawford's*, leaving each of them other debts still unpaid, which arose in the usual and ordinary transactions between them as merchants.

It has been said that these appellants never would have been paid, except for the peculiar relation in which they stood to *Ford*. But this does not vitiate the payment. A man may yield more readily to the solicitation of a creditor, to whom he is under peculiar pecuniary obligations, and it is perfectly probable that *Ford* was gratified to have an opportunity to place these peculiar debts in a state of comparative security. But there is not in the whole testimony one solitary fact, that goes to show he ever moved in the matter, or suggested to him the necessity of making a demand upon him; nor indeed is there the least evidence of his intention to do this, or any other act, which should make it necessary for him to discontinue his business and trade, or to diminish its extent, until the appellants required of him the delivery of so much of his stock of goods, as was necessary to discharge their claims.

It was also strongly insisted, that the notes on which the appellants were liable for the advances made to *Ford* were not due. The cases referred to in the argument, show that this is not material. The creditor is entitled to use vigilance and obtain security, as well before as after the debt is payable, and it was expressly a part of the contract with the *Crawfords*, to secure them at *any time*, as well as in any mode they might require.

DECREE REVERSED, AND BILL DISMISSED WITH COSTS.

J. S. & J. Wever vs. Baltzell & Davidson.—1834.

**JAMES S. AND JOHN WEVER vs. BALTZELL & DAVIDSON,
GARNISHEES OF McCaffrey.—December, 1834.**

J & W as creditors of M, a non-resident, sued out of the county court an attachment against the goods, chattels, and credits of M, which was laid in the hands of B, who appeared, pleaded *non-assumpsit* by M, and *nulla-bona* as to himself. At the trial of the issues upon those pleas, it appeared in proof, that J and W were citizens of *Maryland*, but because the affidavit on which the attachment issued, did not state that both of the plaintiffs were citizens of the State of *Maryland*, nor of the *United States*, nor residents therein, IT WAS HELD, that the plaintiff could not recover.

Under the act of 1795, *ch. 56, sec. 1*, to warrant the issuing of an attachment, the affidavit of the plaintiff must state that he is a citizen of this State, or of some other of the *United States*.

Under the act of 1825, *ch. 114*, the jurisdiction of the courts, upon the subject of attachments to compel appearances, is extended to any inhabitant or inhabitants, resident or residents of any part of the *United States*, whether of one of the States, or of the *District of Columbia*, or other territories, and who by the existing laws of this State, may be entitled to sue out mesne process; therefore in order to give jurisdiction, the plaintiff must be brought by his affidavit within the class of persons described in this act.

Under our attachment law, our courts exercise a limited jurisdiction, and their right to exercise it depends upon the conformity of the original proceedings with the acts of the legislature; advantage of the want of jurisdiction may be taken by the garnishee at the trial.

APPEAL from *Baltimore* county court.

This was an attachment on warrant, issued under the act of 1795, *ch. 56*, by the appellants, to recover the amount of two notes drawn by *McCaffrey*, in their favor for the sums of \$322 06, and \$210, one at thirty, and the other at sixty days from February 9th, 1832. The attachment issued on the 14th of April, 1832, on the following affidavit of one of the appellants, "personally appeared before me, the subscriber, a justice of the peace, &c., *James S. Wever*, a citizen of the State of *Maryland*, and made oath, that *Bernard McCaffrey*, is justly and *bona fide* indebted unto him, and his partner, *John Wever*, merchants, trading under the firm of *James*

S. & John Wever, in the sum of, &c., and at the same time produced to me, &c.”

The appellees, the garnishees appeared, and pleaded *non assumpsit* by *McCaffrey*, and *nulla bona*, to which there were issues.

It was admitted at the trial that the notes were signed by *McCaffrey*, and that when the affidavit was made, and the attachment issued, both the plaintiffs were citizens of the State of *Maryland*, doing business in the city of *Baltimore*, and residing therein; and that the garnishees held a fund in their hands belonging to *McCaffrey*.

The defendants then prayed the court to instruct the jury, that the plaintiffs are not entitled to recover, because the affidavit on which the attachment issued, does not state on its face, that *John Wever*, one of the plaintiffs, and partner of the said *James S. Wever*, is, or was a citizen of the State of *Maryland*, or of the *United States*, or resident therein; which instruction the court (PURVIANCE, A. J.) gave, and the verdict and judgment being for the defendants, the plaintiffs appealed.

The cause came on to be argued before BUCHANAN, Ch. J., and STEPHEN, DORSEY, and CHAMBERS, J's.

McMahon and *Lloyd*, for the appellants.

The act of 1795, *ch. 56*, does not require that the citizenship of the creditor should appear in the affidavit. That fact need not appear to the magistrate, and his certificate to that effect is of course unnecessary. The only proof to be made before that officer, is the existence of the debt, and the absconding, &c., of the debtor. Jurisdiction it is true must exist at the commencement of the proceeding, but there is no reason, why the fact which confers it, may not be subsequently disclosed. In the federal courts, it is sufficient if the jurisdiction appears at any time before the trial. It need not be apparent in the original writ. 2 *Peters S.C.R.* 556. Nor is it indispensable that the subsequent pleadings should

disclose it, it being sufficient if it appear by the proof. 1 *Kent Com.* 324. 10 *Wheat.* 188. 4 *Harr. and McHen.* 291. 2 *Wash. C. C. R.* 382. But at all events, the affidavit, which is the institutory process, need not show the jurisdiction. It may be shown in the declaration, and if omitted, may be introduced by amendment. The affidavit was only required to prevent abuse of the process, and if it stated the fact of citizenship, would not be proof of it. *Mandeville vs. Jarrett*, 6 *Harr. and Johns.* 497. The certificate of the justice cannot be viewed as a part of the pleadings, for if so, it would be amendable, as all pleadings are.

In the case of *Shivers vs. Wilson*, 5 *Harr. and Johns.* 130, the plaintiff failed to recover, not because of the defectiveness of the affidavit, but because he failed or refused to prove the necessary fact at the trial. The defect was in the proof, and not in the statements of the affidavit. And in the case of *Yerby vs. Lackland*, 6 *Harr. and Johns.* 446, the court referred to the facts as they appeared in the evidence, from which it is fairly inferable that if the necessary fact had been found there it would have been sufficient.

2. But admitting that the right to the process of attachment should appear in the affidavit, still the plaintiffs in this case are entitled to recover, as the certificate of the justice shows that one of them is a citizen of the State.

The principles which have governed the federal courts, in regard to suits between citizens of different States should have no influence upon the construction of our attachment laws. In order to entitle parties to sue in the federal courts, all the plaintiffs must be non-residents of the State of which the defendant is a citizen. If any of them are citizens of the same State with the defendant, the object of giving jurisdiction to the courts of the *United States* does not exist, which was to protect non-residents from the apprehension that the authorities of the respective States might adopt a course of legislation partial to their own citizens, in their controversies with foreigners. But if any of the plaintiffs reside in the same State with the defendant, this danger

cannot exist, because laws aimed at the interests of the non-resident plaintiff, would also prejudice the resident plaintiff; which if there be any ground for the apprehension, would in all such cases ensure impartiality.

But the object of our attachment laws was to protect the rights of our own citizens, and the citizens of other States, and there is no reason why they should be deprived of the benefit of those laws, by the circumstance of their being associated with a foreign partner or creditor. It is surely more reasonable that the citizen creditor should extend the privilege to his foreign associate, than that his connection with the latter should deprive him of it.

The act of 1825, *ch.* 114, extends the right to sue out an attachment, to residents or inhabitants of the districts and territories, as well as to the citizens of the States.

Johnson, for the appellees.

The question is, whether the affidavit, on which the attachment issued, must not show that all the creditors are not citizens, or parties entitled to the benefit of the process. In the exercise of this power, the jurisdiction of the courts is limited, and must appear by the proceedings. 3 *Cranch*. 262. 1 *Wheat*. 91. 5 *Harr. and Johns*. 130. 6 *Harr. and Johns*. 446, 447. Unless the jurisdiction appears in this way, the proceeding may at any time be arrested on motion. If it does so appear, there must be a plea in abatement. In the case of *Mandeville vs. Jarrett*, 6 *Harr. and Johns*. 497, it was decided, that the fact of citizenship must be proved under the plea of *non-assumpsit*; and if so, it must be alleged, as the proof need never go beyond the allegations. If the fact of citizenship may be proved, without a corresponding allegation, then all the other requisites may likewise be proved without being averred; such as that the party made an affidavit at all, and that the cause of action was produced to the magistrate. In truth, the parties might go to trial without any allegation on either side, and the cause submitted to the jury without an issue, for them

J. S. & J. Wever vs. Baltzell & Davidson.—1834.

to find, or guide for the court in deciding upon the relevancy of the testimony.

BUCHANAN, Ch. J., delivered the opinion of the court.

By the act of 1795, *ch. 56, sec. 1*, it is provided, that “if any person whatsoever, not being a citizen of this State, and not residing therein, shall, or may be indebted, unto a citizen of this State, or of any other of the *United States*, or if any citizen of this State, being indebted unto another citizen thereof, shall actually run away, abscond, or fly from justice, or secretly remove him, or herself, from his or her place of abode, with intent to evade the payment of his or her just debts, *such* creditor may in either case, make application to any judge, justice, &c.,” and that “on the oath, or affirmation (which oath, or affirmation is prescribed by the act,) of *such* creditor, made before any judge, &c.” the said judge, justice, &c., shall issue his warrant to the clerk to issue an attachment against the lands, tenements, goods, chattels, and credits of the debtor; upon the receipt of which warrant, together with the proofs on which it was granted, the clerk is required to issue an attachment. The third section requires that upon the issuing of every such attachment, there shall be issued therewith, a writ of *capias ad respondendum* against the defendant, and that a declaration or short note expressing the plaintiff’s cause of action shall be filed, and a copy thereof sent with the writ, to be set up at the court house door by the sheriff. And the fourth section provides, that the garnishee may plead in behalf of the defendant, any such plea, or pleas, as he might have pleaded if he had been taken under the writ of *capias ad respondendum*, and had appeared thereto. It is not every creditor, that under that act, would be entitled to the process of attachment, nor under all circumstances; but such a creditor only, as is therein described: *a citizen of this State, or of some other of the United States*.

Not only was the remedy by attachment confined to a citizen of this State, or some other of the *United States*,

but being a privilege extended to that description of creditors only, it was necessary that a plaintiff, seeking the benefit of that peculiar privilege, should be stated in the proceedings to be a citizen of this State, or of some other of the *United States*, to bring the case within the purview of that act, and thus to give jurisdiction to the judicial tribunals of the State, which they had not in the case of a creditor of any other description; and being thus restricted and limited in their jurisdiction, could only entertain a case brought within the pale of the act, by describing the plaintiff upon the face of the proceedings, to be the *peculiar* creditor entitled by its provisions to the process of attachment; the question of jurisdiction in all cases of special and limited jurisdiction, depending upon the case made and presented by the proceedings. Hence the necessity in proceedings under that act for describing the plaintiff as being a citizen of this State, or of some other of the *United States*, and the defendant as an absconding citizen of the State, or as not being a citizen of the State, and not residing therein; (they being alone, the description of persons embraced by the act, except in cases of attachments founded upon judgments, in relation to whom the process of attachment was authorised, and jurisdiction conferred on the courts of the State,) to give jurisdiction by presenting on the face of the proceedings, a case within the provisions of the act. And this seems clearly and peculiarly to be required by the very nature of the proceedings in attachment, under the several laws of this State. In the language of the act of 1795, *ch.* 56, *sec.* 1, “such creditor may make *application to any judge, justice, &c.*” and *on the oath, or affirmation of such creditor, made before any judge, justice, &c.*” the said judge or justice, &c. shall issue his warrant to the clerk to issue an attachment, &c. Such creditor: what creditor? why a citizen of this State, or of some other of the *United States*, the creditor before described in the act. The judge, or justice, therefore, is only authorised under that act, to grant his warrant for issuing the attachment in the case of *such a*

creditor. And the oath, or affirmation of the creditor, accompanied by the cause of action, (which is also required to be produced,) being alone the ground or evidence upon which the warrant is issued, the citizenship of the plaintiff, and also of the defendant, or the non-residence of the defendant, as the case may be, must be stated in the oath or affirmation, otherwise, there would be nothing to show the jurisdiction or authority of the judge or justice, for issuing the *warrant*; the declaration, or short note required to be filed, upon the issuing of the *capias ad respondendum* against the defendant, being *subsequent* to the *warrant* for issuing the attachment, furnishing of course, no ground or authority for granting the *warrant*, and its only office being to express the plaintiff's cause of action, and that after the *warrant* has been issued. And if there be no foundation laid to support the *warrant*, what ground would there be for the *attachment* (the fruit of the *warrant*) to rest upon. Again, under the act of which we have been speaking, and the act of 1715, *ch. 40, sec. 3*, to which it is a supplement, on the return by the sheriff of the attachment, and of *non est inventus* to the *capias ad respondendum*, if the defendant should not then appear, nor the garnishee, in whose hands the goods, &c. of the defendant were attached, to show cause to the contrary, the court is required to condemn the goods, &c. attached. But unless the citizenship of the parties, or in relation to the defendant, his not being a citizen of the State, and not residing therein, (as the case may be,) appears upon the face of the proceedings to show the authority of the judge or justice, to grant the warrant upon which the attachment was issued, and to give jurisdiction to the court, (which can only be by a statement in the oath or affirmation of the plaintiff; which, with the production of his cause of action is the prescribed authority of the judge or justice for his issuing his *warrant*, and the only proof required,) the judgment of condemnation for any thing appearing in the record, might be at the suit of an alien, not embraced by the 1st section of

J. S. & J. Wever vs. Baltzell & Davidson.—1834.

the act of 1795, *ch.* 56, and to whose case, the jurisdiction of the courts of this State does not extend in proceedings under that section; but is limited to the description of persons therein mentioned. Without such a statement therefore, there could not be a judgment of condemnation, for the want of jurisdiction being given by the proceedings, and appearing in the record; no more than in the case of a petition, &c. in a court of limited jurisdiction. And it is no answer to say that the fact of citizenship, &c. may be proved at the trial, on the appearance and pleading by the garnishee. That is true, and to sustain the suit it must be proved. But if jurisdiction is not given to the court by the previous proceedings, the appearance and pleading by the garnishee cannot give it, and the proof and trial would be *coram non judice*, and judgment would be arrested on motion, after verdict for the plaintiff. There can be no recovery against a garnishee in a case in which, for the want of jurisdiction appearing upon the record, the goods of the defendant could not have been condemned. A court that would be constrained to quash an attachment, for the want of jurisdiction being given by the proceedings on which it is founded, cannot entertain jurisdiction against a garnishee coming in under the same proceedings. The condemnation of the goods, and the recovery against the garnishee, are only different actions of the court in the same case, and if the case itself as stated, does not give jurisdiction for the purpose of condemnation of the goods attached, it cannot for the purpose of a recovery against the garnishee, on the evidence given at the trial, being only proof taken in a case not brought by any statement in the proceedings within the jurisdiction of the court.

We had supposed that this question had been settled by the decisions of this court. *Shivers vs. Wilson*, garnishee of *Walker, et al.*, 5 *Harr. and Johns.* 130, was a case of attachment in which *Shivers*, the plaintiff, was described as being a *citizen of the United States*. *Wilson*, the garnishee, appeared and pleaded *non assumpsit*, by *Walker*,

et al. and *nulla bona*; and the court at the trial instructed the jury on the prayer of the garnishee, that the citizenship of the plaintiff was not sufficiently set forth in the attachment, and that the plaintiff was not entitled to recover, without giving evidence to the jury to satisfy them that he was a citizen of this State, or some other of the *United States*; as a man may be a citizen of the *United States*, but residing in the *District of Columbia*, or some one of the territories, and not a citizen of *this State*, or of *any other of the United States*, of which there was no proof. And on an appeal to this court by the plaintiff, against whom there was a verdict and judgment, the judgment of the court below was affirmed. It was supposed in the argument of *this* cause, that that case decides no more, than that it was incumbent on the plaintiff to *prove* that he was a citizen of *this State*, or of *some other of the United States*; and that such proof would have been sufficient without its being stated in the proceedings.

We do not so understand it; and it will be seen that the judge who delivered the opinion of this court, asserts in the whole course of his argument, the necessity for setting out in the proceedings the citizenship of the plaintiff, according to the description given in the act of 1795, in order to give jurisdiction, and that the case must by the *proceedings* disclose itself to be within the limited jurisdiction,—and assimilates it to the decisions of the Supreme court, upon similar expressions in the constitution of the *United States*, and the judiciary act of Congress in relation to suits in the courts of the *United States*, between citizens of different states, the amount of the decision being that it must be both stated and proved. In *Yerby vs. Lackland and others*, garnishees of *Beeding*, 6 *Harr. and Johns.* 446, the same principle is recognized; though in that case, in addition to the insufficiency of the description of the plaintiff, to bring the case within the provisions of the act of 1795, *ch.* 56, he appears in point of fact to have been a citizen in the *District of Columbia*. And in *Mandeville vs. Jarrett*, 6 *Harr. and*

Johns. 497, where the plaintiff is properly described as *being a citizen of this State*, proof also of his being a *citizen of this State* was held to be necessary.

Since then, the jurisdiction of the courts has been extended by the act of 1825, *ch. 114*; and by the first section of that act, it is made lawful for any inhabitant, or inhabitants, or resident, or residents, of any part of the *United States*, whether of one of the States, or of the *District of Columbia*, or other territories, and who by the existing laws of this State, may be entitled to sue out, and prosecute mesne process, to have, use, and prosecute the process by attachment. Not however extending the privilege to non-resident foreigners, but restricting it to *inhabitants or residents*, within the *United States*. The same necessity therefore, in order to give jurisdiction, still exists, for describing in the proceedings the plaintiff to be *an inhabitant or resident of the United States, &c.*; which before existed for describing him to be a *citizen of this State, or of some other of the United States*. In this case the plaintiffs appear to have been partners in trade, and the affidavit is made by one of them only, in which he is described as being a citizen of this State, without any notice being taken of the residence of the other; though it appears by admissions at the trial, that he was also a citizen of this State.

The garnishees appeared and pleaded *non-assumpsit* by the defendant, and *nulla bona*; and the court below, on the prayer of the garnishees, instructed the jury that one of the plaintiffs not being stated in the affidavit to be a citizen of *this State*, or of the *United States*, or a resident therein, they were not entitled to recover.

The special privilege of suing out attachments, being confined to inhabitants, or residents within the *United States*, it cannot be extended to plaintiffs of any other description, without a violation of law, and a usurpation of jurisdiction. And seeing that jurisdiction cannot be taken in a case of attachment, unless it be given by a statement in the affidavit, that the plaintiff, if there is but one, *is an inhabitant, or*

Bruce and Fisher vs. Cook, Garnishee of Scarborough.—1834.

resident within the United States; so neither can it be taken when there are two or more joint plaintiffs, unless they are all stated in the affidavit to be *inhabitants, or residents within the United States*. Each must appear on the face of the proceedings, to be entitled and competent to sue out the process of attachment to give jurisdiction of the case. That would be our construction of the act of 1795, *ch. 56*, if there was no other. But the act of 1825, *ch. 114*, in extending the privilege to an *inhabitant, or inhabitants, or resident, or residents*, of any part of the *United States*, clearly contemplates the same proceedings, in the case of two or more joint plaintiffs, as in the case of a sole plaintiff; and means, that where there are two or more plaintiffs, they must all be *inhabitants, or residents within the United States*. Here one of the plaintiffs having a joint interest with the other, is not stated in the affidavit to be *an inhabitant, or resident within the United States*. As to him then, the case does not disclose itself by the proceedings to be within the limited jurisdiction of the courts of this State, nor present him as a person entitled to sue out an attachment.

The question is not, whether the plaintiffs had a right to attach, if they had proceeded properly, but whether they had proceeded properly. We think they have not, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

BRUCE & FISHER vs. COOK, GARNISHEE OF SCARBOROUGH.—*December, 1834.*

The objection, that the affidavit, upon which an attachment issued to compel an appearance, did not give the court jurisdiction, may be taken advantage of at any time, and may be either upon a motion to quash before or after plea pleaded, by demurrer, by a prayer for an instruction from the court after swearing the jury—after verdict on a motion in arrest—after

Bruce and Fisher vs. Cook, Garnishee of Scarborough.—1834.

judgment (without raising the objection below,) upon appeal on writ of error, assigning the want of jurisdiction as error in the appellate court.

Where there is a defect of jurisdiction patent upon the record, a motion to quash an attachment may be granted, though the reason assigned for the motion be erroneous.

APPEAL from *Baltimore* county court.

On the 21st of April, 1832, the appellants, *Henry Bruce*, and *William Fisher*, sued out an attachment, on the warrant of a justice of the peace, under the provisions of the act of 1795, *ch.* 56, to recover the amount of two notes made by *Scarborough*, payable to them, each for \$225 60, dated on the 11th of October, 1831, at four and six months.

The attachment issued on the affidavit of *Bruce*, one of the appellants, in which *he* is stated to be a citizen of the State of *Maryland*, and the money due to him and *Fisher*, as merchants and partners in trade; but neither the citizenship, or the residence of *Fisher* appears in the affidavit, or any other part of the proceedings.

After the appearance of the *garnishee*, and issues joined upon the pleas of *non assumpsit*, and *nulla bona*, he moved the court to quash the attachment, because it did not appear in said *attachment*, that the plaintiff, *William Fisher*, was at the issuing of the same, an inhabitant, or resident of any part of the *United States*, or a citizen thereof, or of any one of the *United States*. The court sustained the motion, and quashed the attachment, and the plaintiffs thereupon brought the record by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, DORSEY, and CHAMBERS, J.

McMahon and *Lloyd*, for the appellants, (in addition to the points made, and authorities relied upon in the preceding case) insisted, that the *motion* to quash could not be entertained, whilst there was an issue pending for the jury. The objection if valid might have been taken under the issue; and there cannot be at the same time an issue and demurrer to the same proceeding.

But it certainly is not necessary, that the fact of citizenship should appear in the *attachment*, and the absence of the allegation there, being the specific ground of the motion to quash, the appellee under the act of 1825, is precluded from relying on any other ground.

Johnson, for the appellee.

The point on the other side is, that the motion to quash was based upon a defect in the attachment, and not the affidavit, and therefore, we cannot look to the latter at all; but if the court did right to quash the proceeding, the *reason* which influenced them cannot be very material. Why should the court permit the cause to proceed to trial, when the want of jurisdiction was apparent, and judgment would be arrested even after verdict.

BUCHANAN, Ch. J., delivered the opinion of the court.

This case differs from the case of *Wever and Wever, vs. Baltzell and Davidson*, garnishees of *McCaffrey*, just decided, only in this; that here, after the appearance and pleading by the *garnishees*, and issues joined, the attachment was quashed by the court below, on motion of the garnishees; from which judgment of the court the appeal was taken. And we can perceive nothing in the judgment to complain of, either as respects the reason assigned in the motion to quash, or the stage of the proceeding at which it was made. The reason assigned is, that it does not appear in the *attachment*, that *William Fisher*, one of the plaintiffs, was an inhabitant, or resident, of any part of the *United States*, or a citizen thereof, or of any one of the *United States*.

We have seen in the cause just decided, that to give jurisdiction to the court, it should have so appeared in the affidavit that was the foundation of the warrant, and writ of attachment, which all taken together, form the cause of attachment. The judgment is general, and does not purport to be founded upon the absence of a proper description of

Bruce and Fisher vs. Cook, Garnishee of Scarborough.—1834.

William Fisher, in the *writ* of attachment, and must be taken to have been founded on the want of jurisdiction for the defect apparent in the proceedings. The objection substantially, was to the jurisdiction, for the want of a sufficient description of one of the plaintiffs, in the case of attachment made by the proceedings, and not merely in the *writ* of attachment. And to say, that this court must be confined by the terms of *the attachment* used in the reason assigned in the motion to quash, to the *writ of attachment*, and cannot look beyond it, when it appears by the record, that a sufficient description according to the provisions of the act of 1825, *ch.* 114, is not given in the affidavit, (where it should properly appear) and therefore, that the court below had not jurisdiction of the case, would be to sustain an objection rather too attenuated. The other objection, that the motion to quash was made after issues joined, rests we think on no better foundation.

The garnishees need not have pleaded as they did, but might have availed themselves of the want of jurisdiction by demurrer. It would have been a fatal objection after verdict, on a motion in arrest of judgment. They might have taken advantage of it, if a jury had been sworn, by a prayer for the instruction of the court; or after verdict and judgment against them, without raising the objection below, it might on appeal or writ of error, have been assigned as error here, and this court would have taken notice of and sustained it. In *Yerby vs. Lackland*, 6 *Harr. and Johns.* 446, the garnishees pleaded *nulla bona*, and under instructions given by the court, to which exceptions were taken, they obtained a verdict and judgment. No objection was raised to the jurisdiction in the court below; and on an appeal to this court, by the plaintiff, it appearing from the record, that he had failed to show himself to be of that description of persons who had a right, under the provisions of the act of 1795, *ch.* 56, to sue out an attachment, the judgment for that reason was affirmed, without any examination of the questions raised in the bills of exceptions. Why

Ward *et ux.* vs. Thompson.

then in this case should the court, merely because issues had been joined between the parties, have overruled the motion to quash the attachment, and suffered the mere forms of a trial to have been gone through, seeing that it had no jurisdiction in the cause? It was the right of the court on perceiving its want of jurisdiction at any stage of the proceedings, before the swearing of a jury, to entertain a motion to quash the attachment, and arrest the further progress of the cause. To have rejected the motion, and proceeded with the trial of the cause on the issues joined, would have been to exercise a jurisdiction, that it knew it was not invested with, and could not be sustained in this court, and for want of which, that court could not have given a valid judgment on a verdict for the plaintiff.

JUDGMENT AFFIRMED.

FRANCIS A. WARD *et ux.* vs. ROBERT THOMPSON.—
December, 1833.

T and M in contemplation of marriage, agreed that all the property of the intended wife, (M,) and estate of every description to which she was then entitled, or might thereafter become entitled, should be, and was thereby conveyed to a trustee and his heirs in trust, for the use and benefit of the said M, her heirs and assigns forever, without impeachment of waste; all which property to be under, and subject to the exclusive and entire management and control of the said M, her heirs, &c. without the interference in any manner of the said T; and the said M, her heirs, &c. to receive and enjoy the rents, &c. thereof, with power to M, to sell and dispose of the said estate by last will as if she were a *feme sole*. After the marriage and death of the wife without will; HELD, that the true character of the contract was not a temporary surrender of the marital rights over the estate during the life of M, but an entire abandonment of them, and therefore he was not entitled to administration upon her estate.

Where the contract of marriage merely suspends the marital rights over the wife's estate during her life, and she fails to exercise the right of appointing an executor, where the right to devise is secured to her by the contract; then the husband is entitled to administration, and to the undisposed personal estate, and chuses in action of his wife.

APPEAL from the Orphans court of *Prince Georges* county.

The appellee in this case had obtained from the Orphans court of *Prince Georges* county, on the 19th June, 1833, letters of administration on the personal estate of his deceased wife, *Ann W. Thompson*, formerly *Ann W. Menger*. On the 27th of the same month, the appellants filed their petition, alleging that the letters were improvidently granted to the appellee,—that the appellant's wife was entitled to the same, she being the eldest child of the intestate by a former husband; and exhibiting with their petition an ante-nuptial contract, made between *Thompson* and wife, on the 24th of May, 1828; prayed that the letters of administration, which had been granted to the appellee might be revoked, and that letters, &c. be granted to them. The contract referred to in the petition, which was duly executed by the parties, after reciting that a marriage was about to be had and solemnized between the said *Thompson* and *Menger*, provided, that all the property and estate of every description, to which the said *Ann W. Menger* was then entitled, or might thereafter become entitled, should be, and was thereby conveyed to a trustee and his heirs, in trust, “for the use and benefit of the said *Ann W. Menger*, her heirs and assigns forever, without impeachment of, or for any manner of waste; of all which property to be under, and subject to the exclusive and entire management and control of the said *Ann W. Menger*, her heirs, executors, administrators or assigns, without the interference in any manner of the said *Robert Thompson*. And the said *Ann W. Menger*, her heirs, executors, administrators or assigns, to receive and enjoy the rents, issues, and profits thereof. And the said *Ann W. Menger* to have full power and authority to make such disposition of all, or any part of said property, as she at any time may think proper and advisable, and to dispose of the same by last will and testament, in as full, free, and ample manner, as if she were not a

married woman but a *feme sole*." The prayer of the petition being refused by the Orphans court, the record was brought by appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

T. F. Bowie, for the appellants.

The Orphans court committed an error in granting letters of administration upon the personal estate of *Ann W. Thompson* to the appellee, because the legal effect and operation of the marriage settlement is to divest him of his marital rights in relation to said property, and standing in the attitude of a stranger in reference to the same, he is not entitled to administration thereon, so long as there are children, or next of kin of the wife, capable of administering on said estate.

Marriage settlements are to be construed so as to carry into effect the *intentions* of the parties; they are mere creatures of equity, and it has always been the practice of the courts, to give to them such an operation as would prevent the infringement of contracts, solemnly made and understandingly entered into. *Meth. E. Church vs. Jaques*, 3 *Johns. Ch. Rep.* 89. No general rule has ever been adopted, as of universal application in the construction of marriage settlements, other than that of the *intention* of the parties: each is to be construed according to its obvious meaning and intention, to be gathered from the whole instrument, and its parts taken together, and must depend upon, and be regulated by the peculiar phraseology used, and the probable motives which appear to have actuated the parties. That *intention*, however, must be derived from the effect and operation, of the legal import of *technical* expressions, for whatever may be the real meaning of the parties, it will not be allowed to prevail against the legal import of technical terms. They have a *fixed* and *definite* meaning, and wherever they occur, whether in deeds, wills, marriage settlements, or elsewhere, they are supposed to

Ward *et ux.* vs. Thompson.

be used in the sense of their technical import. With this restriction alone, upon the liberty of alienation, a restriction founded in the best policy of the law, and intended as a certain and better security to the rights of property, the courts are always disposed to permit the *intention* of the parties to prevail in the disposition of property. What then was the intention of the parties to this marriage settlement? and how far does it operate to divest the appellee of his marital rights over the property contained in it? There are several *dicta* of learned judges, which speak of the husband as being *next of kin* to the wife, as in the case of *Fettiplace vs. Georges*, 1 *Ves.* 49, also in 3 *Bro. Ch. Ca.* 10, where *Ld. Thurlow* says, "if the wife makes no disposition, the husband takes it as next of kin, not from his marital rights." But it will be found that this *dictum* of *Ld. Thurlow's* has long since been overruled, and later and numerous cases have decided, that the husband is not *next of kin* to his wife, and that he is entitled to *administration* and her whole personal property, by reason only of his *marital rights*. If he renounces those rights, the property must be distributed to her next of kin, excluding the husband; and if he gets administration, he takes the property as trustee for the next of kin, without any beneficial interest to himself. *Watts vs. Watts*, 3 *Ves.* 244. *Garrick vs. Camden*, 14 *Ves.* 372. *Anderson vs. Dawson*, 15 *Ib.* 537. *Bailey vs. Wright*, 18 *Ib.* 49. 1 *Swant.* 39.

The rights of a husband to the property of his wife commence with the marriage, and at her death he can claim nothing but a continuation of those rights. If, therefore, he releases or renounces those rights, and no right attaches after the death of the wife, by virtue of the marriage, the property must necessarily go to her legal representatives, to the exclusion of the husband. Now a limitation to *executors* and *administrators*, is, as to personal property, the same as a limitation to right heirs as to real estate. *Anderson vs. Dawson*, 15 *Ves.* 536. And as a devise or grant of real estate to a person and "his heirs forever" will pass the

fee simple, convey the *whole interest* in the estate, and leave nothing undisposed of, so will a devise or grant of personal property to a person "his executors and administrators," pass the *entire* interest in the property, and leave, as to it, also, nothing undisposed of. By the terms of this marriage settlement the whole of the wife's property both real and personal, is conveyed to a trustee, "in trust for the use and benefit of the wife, her heirs, executors, administrators, and assigns, under and subject to *her and their exclusive* and entire management and control, *without* the interference in any manner of the said *Robert Thompson*;" and coupling the words of limitation used in the deed, with those of exclusion to the husband, it would be difficult to discover by what rule of interpretation, they could be made to relate to the appellee. The *whole interest or estate*, which the wife owned in this property, was conveyed in the first instance to a trustee, and there must appear something in the marriage settlement, by which such an estate was secured or *taken back* to the wife, to which the marital rights of the husband could have attached at the time of her death. But the estate which was secured, or taken back to the wife by way of use, we find to be of the same extent and duration, with the one conveyed in the first instance to the trustee, though of a different nature, the one being a legal and the other an equitable estate. The limitation of the use is, to the wife, her heirs, *executors, administrators*, and assigns, without the interference of the said *Robert Thompson*, extending as effectually to a period of time beyond her death, and making as complete a disposition of the property after her death, to the exclusion of the husband, as if the most express terms had been used for that purpose. It is not like the case of a marriage settlement, where the control and dominion over the property conveyed, is secured to the wife for a limited period of time only; such as during the *coverture*, as in the case of *Stewart vs. Stewart*, 7 Johns. Ch. Rep. 229. But the dominion and control over the property in this case, is secured to the wife with-

out limitation of time. The trustee is to be as much a trustee as to the real estate, for the right heirs of the wife when dead, as for herself when living, and the personal property is to pass into the hands of her executor, if she should appoint one, or of her administrator, if she should die intestate, without the *interference* in any manner of her intended husband, the present appellee. Where then is the estate, to which the marital rights of the husband could have attached upon the death of the wife? It is true, that by the terms of this marriage settlement, a power of appointment either by deed or will is secured to the wife, and she has failed to make either; but it is equally clear, that an effectual disposition of the property after her death, and in case of intestacy is provided for, by the legal effect and operation of the technical terms used; which taken in connection with the words of exclusion to the husband, clearly shew, that by no possibility can they relate to him. The failure of the wife to make an appointment, either by deed or will, cannot destroy the effect of the superadded provision in the deed, the legal intendment of which is, to carry the estate beyond the period of her death, and to the exclusion of her husband. This is not the case then of an undisposed of interest of the wife, and which upon her death without an appointment by her, would revert to the husband by virtue of his marital rights, as in the case of *Stewart vs. Stewart*. In that case there was no provision, either by express words or the use of technical terms, the legal import of which could, by construction, have carried the estate beyond the *coverture* of the parties. On the contrary, the disposition of the property was limited expressly to the period of *coverture* alone, and there is not the slightest expression used, from which the inference can be drawn, that the husband ever intended to renounce his marital rights beyond that period. But the words of this marriage settlement have the effect in law, of creating a disposition of the estate beyond the death of the wife, which it manifestly seems, was not designed to enure to his benefit; for by the

express terms of the marriage settlement, the property is secured to the wife, her *heirs, executors, and administrators, without the interference of the husband*. Have not the Orphans court, by granting letters of administration to the appellee, disregarded the solemn stipulation of the appellee himself, and if he should get the administration, would it be a compliance with his agreement in the marriage settlement, that the *administrator* of the wife, should have the property *without his interference*? If the property had been conveyed in the following manner, "to, and for the sole and exclusive use and benefit of the wife, during her *life or coverture*, and *after her death*, to, and for the sole and exclusive use and benefit, of her *heirs, executors or administrators, without the interference* of the said, &c." it is apprehended there could have been no doubt, that the husband would be excluded, and yet it is difficult to discover any material distinction in law between these words, and those used in the marriage settlement. The appellee can only be entitled to administration on the ground, that by virtue of his marital rights, he is entitled to the property itself. *Stewart vs. Stewart*, 7 Johns. Ch. Rep. 247. And the court will not be disposed, in opposition to his solemn engagements, to place such a construction upon the marriage settlement, as will defeat the designs of the parties to it.

Alexander, for the appellee.

1. Though the husband may have no beneficial interest in the property, he is still entitled to administration, as the power reserved to the wife in the settlement has not been executed. 1 Wms. Ex'rs, 245.

2. But the interest of the husband is a beneficial one, the wife having failed to make an appointment. In that event unless the husband could take, the property would be without an owner. 7 Johns. Ch. Rep. 229, 246. 15 Ves. 537.

DORSEY, J., delivered the opinion of the court.

The right of *Robert Thompson*, the husband, to the letters of administration granted to him on the estate of his deceased wife is undeniable, unless he be divested of that right, by the deed of settlement executed anterior to wedlock: by which it is declared, that the trustee to whom her real and personal property were granted, should hold the same in trust, "to and for the use and benefit of the said *Ann W. Menger*, her heirs and assigns forever, without impeachment of, or for any manner of waste; all of which property, to be under and subject to, the exclusive and entire management and control of the said *Ann W. Menger*, her heirs, executors, administrators, or assigns, without the interference in any manner of the said *Robert Thompson*. And the said *Ann W. Menger*, her heirs, executors, administrators, or assigns, to receive and enjoy the rents, issues and profits thereof; and the said *Ann W. Menger*, to have full power and authority to make such disposition of all, or any part of said property, as she at any time may think proper and advisable. And to dispose of the same by last will and testament, in as full, free, and ample manner, as if she were not a married woman, but a *feme sole*." It is manifest on the perusal of this deed, that it is not from the hand of an experienced, skilful conveyancer. It appears to have been inartificially drawn, having omitted a clause usually embraced in such a conveyance, by which the ultimate disposition of the property, in case of the wife's death without disposing thereof in her life-time, by last will and testament or otherwise, would be provided for. Had such an omission occurred in an *ante-nuptial* contract in the usual form, securing her property to the wife for life, without any interference or control of the husband, and giving to the wife the power of testamentary, or other disposition in her life-time, as in the case of *Stewart vs. Stewart*, 7 *Johns. Ch. Rep.* 228, the right of the husband to the property, and of the administration thereof, over which the wife had failed

to exercise her power of appointment, could not be controverted. The marital rights of the husband having been suspended only during the life of the wife, after her death they are as efficaciously revived, as regards the future, as if no such suspension had ever taken place. As a necessary consequence, he is entitled to all the undisposed of personal estate, and *choses in action* of his deceased wife. But such is not the condition of the husband in the present case. He has not made a temporary surrender of his marital rights over the estate in question, during his wife's life; but has abandoned them forever. His agreement is that, "without the interference in any manner of the said *Robert Thompson*," "all of which property to be under, and subject to the exclusive and entire management and control of the said *Ann W. Menger*, her heirs, executors, administrators; or assigns," "and the said *Ann W. Menger*, her heirs, executors, administrators, or assigns, to receive and enjoy the rents, issues, and profits thereof." In the trust estates of the wife, the husband is entitled to a life-estate, as tenant, by the courtesy. Could it be contended, that the appellee in this case might claim in that character, against the heirs of his wife, in whose favor he had renounced all his rights, and had expressly agreed that they should have "the exclusive and entire management and control" of the premises in question, and that they should "receive and enjoy the rents, issues and profits," arising therefrom? We think not. Upon what principle then can the appellee's claim to the personalty be sustained? He has made the same renunciation and agreement, in favor of the executor or administrator, that he did in favor of the heirs of *Mrs. Menger*, and is equally barred in both cases.

The order of the Orphans court, for the granting of letters of administration to *Robert Thompson* on the estate of *Ann W. Thompson* is reversed, and the record in this case remanded, that letters of administration may be granted by the said Orphans court, to the person thereto entitled.

ORDER REVERSED AND PROCEDENDO AWARDED.

Albers vs. Wilkinson.—1834.

SOLOMON G. ALBERS vs. GEORGE WILKINSON.—December, 1834.

In an action against W and H as joint obligors of a single bill, signed and sealed in a partnership name, H who had suffered a judgment by default, upon the plea of *non est factum* by W, was offered as a witness by the plaintiff, to prove the execution of the single bill by H, in the presence of and with the consent of W, and also to prove another single bill in the hand-writing of W, and to which he had affixed the partnership name,—HELD, that H was not a competent witness, being interested in fixing W's liability.

One partner has no right to bind his co-partner by deed or specialty, without his consent or authority, derived from him for that purpose.

APPEAL from Calvert county court.

Debt on a single bill for \$649 87, dated August 12th, 1830, at sixty days, signed, *Wilkinson and Holland*, and payable to the appellant, who instituted the present action upon it, against both the obligors, on the 11th of October, 1831. Upon the facts as stated by the judge who delivered the opinion of this court, the county court (DORSEY, Ch. J., and KILGOUR, and WILKINSON, A. J's.) rejected the plaintiff's evidence, and the verdict and judgment being for the defendant, the plaintiff appealed to the court of Appeals.

The cause came on to be argued before BUCHANAN, Ch. J., and STEPHEN, and CHAMBERS, J's.

McMahon, for the appellant.

The nature of the question propounded to *Holland*, was not such as to render him incompetent. The object was to prove that in making the bill, he acted as the agent of the defendant, and for that purpose he was unquestionably competent, though the effect was to change a seeming single liability into a joint one. A bond given by one partner in the name of the firm, and with its authority, is the deed of all the members. *Ball vs. Dunsterville*, 4 Durnf. and East. 313.

It is very clear, that a defendant upon the record cannot be made a witness *against* his consent; but if he consent, a co-defendant cannot object. Suppose the case of a single plaintiff and defendant, may not the plaintiff examine the defendant as a witness, if he, the defendant, consent to be so examined; and if this be so, why should the association of another defendant with him make a difference. In both cases the witness would be swearing in opposition to his interest. And in this case, the judgment by default against the witness creates no difficulty, because in an action for contribution, the record would not be evidence. 1 *Strange*, 35. 5 *Gill and Johns*. 134. 2 *Stark. Ev.* 782.

Brewer, for the appellee.

1. The witness was an acknowledged obligor, and consequently liable for the whole debt; whilst by establishing the instrument as the deed of the appellee, he secures the right of resorting to him for contribution. Independently of this objection to the competency of *Holland*, the effect of his evidence was to charge the partnership funds, as well as the private funds of *Wilkinson*.

2. In civil cases the rule is general, that a co-defendant upon the record, is an incompetent witness for the plaintiff. This is the case before his responsibility is fixed by a judgment, *a fortiori*, when there is a judgment against the party offered as a witness; as then, the only effect of his testifying for the plaintiff, is to divide a liability which the judgment renders him individually bound to pay. There is no case in which a defendant upon the record, has been admitted against another defendant. *Bel. N. P.* 285. 2 *Campb.* 333, *note*. 4 *Taunt.* 752. 8 *Ib.* 139, 140, 141. 2 *Stark. Ev.* 766. 4 *Maul. and Selw.* 475.

STEPHEN, J., delivered the opinion of the court.

In this case a suit was brought on a single bill, signed *Wilkinson and Holland*, against both of the obligors, who at the time the instrument of writing was executed, were

partners in trade. In the prosecution of the suit, judgment was obtained against *Holland* by default. *Wilkinson* pleaded to issue, and defended himself upon the ground, that the specialty upon which the suit was brought, was not his deed. The single bill being executed by *Holland* alone, and the principle of law being, that one partner, as such, has no right to bind his co-partner by deed or specialty, without his consent, or authority derived from him for that purpose. *Holland* was offered as a witness by the plaintiff, to prove the execution of the single bill by him, in the presence of, and with the consent, and at the request of the defendant; and also to prove a single bill in the hand writing of the defendant, executed in the name of the firm of *Wilkinson and Holland*, payable to a certain *John W. Keirle and Son*, as evidence of the usage and custom of the firm, to execute and make such single bills. To the competency of which witness for the purposes aforesaid, the defendant's counsel objected; the court sustained the objection, and refused to permit the testimony of the witness to be given to the jury. The plaintiff excepted to this opinion, and the question to be decided by this court is, whether the county court were right in their rejection of the said witness.

Upon a careful examination of the authorities, we have not been able to discover any case or principle which conflicts with the decision of the court below, or impugns the soundness or accuracy of their decision; on the contrary, all the writers upon the doctrine of evidence, as far as they have been consulted, seem to hold but one language upon the subject, and that in perfect accordance with the opinion of the county court. In *Norris' Peake*, 225, the principle is stated to be, that "a defendant who suffered judgment by default in an action of contract, is not a witness for the plaintiff to charge the other defendant, he being interested to make him liable for contribution. The same principle is sustained in *Philips' Evidence*, 62, and in 3 *Stark*. 1064. In the cases of *Mant vs. Mainwaring*, 8 *Taunt*. 139, and 4 *Taunt*. 752, it was held, that "a co-defendant in *assump-*

sit, who had let judgment go by default, was not a competent witness for the plaintiff, for by means of his own testimony he would obtain contribution from the defendant who had pleaded." The principle, or rule of evidence, held by the court below in this case, seems to be sustained by the concurring sanction of all these learned writers upon that branch of the science of jurisprudence, and may therefore be considered as fully and sufficiently supported by authority.

In addition however, to the weight justly due to the opinions of these writers upon the law of evidence, we find that their views upon the subject have derived countenance and support, from decisions of the courts of justice, as well in *England*, as in this country. In 4 *Taunt.* 752, an action was brought upon a joint contract against two; one of the defendants suffered judgment to be obtained against him by default; the other defendant defended himself, upon the ground that he had never assented, and of course was not bound. To prove his assent, the plaintiff proposed to call as a witness, the defendant who had suffered judgment by default. His admissibility was objected to by the adverse party, and the court sustained the objection. The court in delivering their opinion say, "it appears this witness was interested in the event of the suit, and interested certainly, in respect of that very evidence which he was called to give, because he came to prove, that the other defendant was equally liable with himself, which would give him a right of contribution from *Jubb*, if the plaintiff succeeded; but if the action failed against *Jubb*, then the consequence would be, that *William Brown* alone, would be responsible to the plaintiff for the whole of his demand." So in 2 *Campb. N. P. Rep.* 333, a case is referred to in a note, where a defendant in trespass, who had suffered a judgment to go against him by default, was called by the plaintiff for the purpose of proving the trespass against the other defendants, and it was held by *Le Blanc*, Justice, that the witness was inadmissible. The principle therefore

Albers vs. Wilkinson.—1834.

seems to be well settled according to the *English* authorities, that a co-defendant who suffers a judgment by default, is not a competent witness for the plaintiff, either in an action founded upon *tort* or contract, to prove the liability of another defendant in the same suit. The ground or foundation of his interest is, that by charging the other defendants in the action, he puts it into the power of the plaintiff to recover the whole of his claim against the other defendant if he thinks proper, and thereby diminishes his own responsibility, which in such event would only be to contribute his proportion. The rule is, that if there is a direct interest in the event of the suit, it will make the witness incompetent, however small and inconsiderable the degree of interest may be. 1 *Philips' Ev.* 53.

In 16 *Johns. Rep.* 89, the case was,—an action was brought against one part owner for repairs done to a vessel, who neglected to plead the non-joinder of the others in abatement; another part owner was called to prove the ownership of the defendant. The witness confessed on his *voir dire*, that he was a part owner of the vessel. In that case *Spencer*, Justice, who delivered the opinion of the court, says: “The witness was undoubtedly interested to render the burthen upon himself as light as possible, and to throw it on the defendant, in part. It is true the witness was liable to contribution, but the defendant could never controvert afterwards with the witness, in case he sued him for contribution, that he was not a part owner of the vessel. He could not take the ground, that a verdict had been recovered against him by the present plaintiff wrongfully. The very basis of a suit to be brought by him for contribution, must be that he was a part owner. Upon any other principle he would be remediless. The recovery in this case would be evidence of the amount he was compelled to pay. The witness being confessedly, by his own admissions on the *voir dire*, a part owner, would be answerable in contribution, and his interest in making the defendant below an owner was promoted, by increasing the num-

Union Bank of Tennessee vs. Ellicott, Morris and Gill.—1834.

ber of those chargeable, and thereby mitigating his own loss. I have met with no case directly in point. My opinion proceeds on the principle, that whenever a fact is to be proved by a witness, and such fact be favorable to the party who calls him, and the witness will derive a certain advantage from establishing the fact in the way proposed, he cannot be heard, whether the benefit be great or small."

In the case before this court, the witness, having suffered a judgment by default, was liable for the whole debt, and we think, the interest which he derived from rendering his co-defendant liable with himself, was sufficient to render him incompetent.

JUDGMENT AFFIRMED.

THE UNION BANK OF TENNESSEE, vs. THOMAS ELLICOTT, JOHN B. MORRIS AND R. W. GILL.

The banking corporations of the State have the right to provide for the payment of their debts, by a transfer of all their property in trust.

The Bank of Maryland being in failing circumstances, executed an assignment of all her property to a trustee, his heirs and assigns, for the purpose of collecting claims, and paying debts. The deed contained a clause declaring that the trustee, "his heirs and assigns, shall in such manner as he shall deem best for the creditors of the said Bank, and *acting in that particular as well as in the entire execution of this trust, under the advice of A. and D., or under the advice and direction of such other person or persons as they may name for the purpose, proceed to collect,*" &c. The trustee accepted the trust, and entered upon its execution; shortly after this, at the request of various creditors of the Bank, as also of its President and Directors, and under the advice and sanction of the persons substituted in the stead of A and D, as advisors of said trust, in virtue of the clause aforesaid, the said trustee agreed to associate with himself two other trustees for the purpose of the better execution of said trusts, and thereupon the said President and Directors and trustee, executed another deed to the said first trustee, and the two other trustees, agreed upon as aforesaid—HELD, that the last deed was valid and effectual for the purposes therein expressed.

Union Bank of Tennessee vs. Ellicott, Morris and Gill.—1834.

Under the act of 1818, ch. 177, and 1824, ch. 199, the debtors of the banking corporations of the State, have the right to pay their debts in the notes, and certificates of deposit, issued by such corporations, without reference to the period of time when such notes and certificates were acquired by such debtors.

The assignees and trustees of an insolvent bank, authorized to collect its debts and pay its creditors, are bound under those laws to receive payment in such notes and certificates.

APPEAL from the equity side of *Baltimore* county court, under the act of 1832, chap. 197.

The bill in this cause was filed on the 4th June, 1834, by the *President and Directors of the Union Bank of Tennessee* against *Thomas Ellicott, John B. Morris* and *Richard W. Gill*, as trustees of the *Bank of Maryland*. It alleged on behalf of the complainants, and all other creditors of the *Bank of Maryland* who should come in and contribute to the expenses of the suit, that in the prosecution of the complainants' business as bankers, the *Bank of Maryland* became indebted to them in a large sum of money, to wit, \$350,000; that on the 23d day of March, 1834, the *President and Directors of the Bank of Maryland* determined to suspend further banking operations and to close their banking house, and on the same day executed a deed of assignment of all their estate, property, rights and credits to *Thomas Ellicott* in trust, to collect and realize the said property, estate, rights and credits, and to divide the same equally and rateably among all the creditors of the said *Bank of Maryland*, according to the deed of trust filed with said bill; that afterwards *John B. Morris* and *Richard W. Gill* having been associated with the said *Ellicott* in the said trust, another deed was executed on the 5th day of April, 1834, which was also filed with said bill; that complainants had no knowledge of said assignments until some time after they were made, nor did they consent or participate in any of the arrangements leading thereto; that the agent of complainant having arrived in the city of *Baltimore* some time in the month of April, 1834, found the said *Ellicott, Morris* and *Gill* acting as trustees under the

Union Bank of Tennessee vs. Ellicott, Morris and Gill.—1834.

said last deed of assignment, and receiving and collecting the out-standing debts due to the *Bank of Maryland* in the notes and certificates of deposit of said bank, which were then and still continue to be greatly depreciated in value, and selling in the market for not more than forty to fifty cents in the dollar; that said agent having in vain remonstrated against this course of procedure as prejudicial to the interests of creditors, had recourse to the opinion of counsel which was against the measure; which opinion said agent communicated to said trustees, and urged them to desist from receiving any more of the notes and certificates of deposits of the *Bank of Maryland* in payment of debts due to that institution; but the said trustees nevertheless continued and still continue to do so, to the injury of the creditors, and to the exclusive benefit of the debtors of the said bank; that the course thus adopted and persisted in, is in direct violation of the spirit and letter of the provisions of the trust deed under which they act, and is not justified by the law of the land, and produces inequality among the creditors; that there will be a large deficiency in the assets of the bank.—Prayer for an injunction prohibiting the said trustees from receiving the notes and certificates of the said bank in payment of debts, and for other relief generally.

With this deed were filed the following exhibits.

1. A deed from the *President and Directors of the Bank of Maryland* to *Thomas Ellicott*, dated the 23d March, 1834. This deed recited as follows: "That whereas the parties of the first part are indebted in a large amount of money on account of deposits received by them—notes issued by them, and on various other accounts which they are now unable to meet—and whereas they have belonging to them a large amount of assets consisting of various species of property, real, personal and mixed, situate in said city and elsewhere, and which, it is believed, if properly and economically administered will be sufficient to discharge said debts, and whereas it is the opinion of said *President and*

Directors of the Bank of Maryland, that it is better for all the creditors of said bank, that all the assets should be placed in the hands of a private trustee, to be appropriated under the provisions of this deed to the payment of said debts," and then after granting and assigning "all the estate, property, funds, rights and credits belonging to the said bank, or in which they are in any way interested, and wherever the same may be situated, to the said *Thomas Ellicott*, his heirs and assigns for ever," declared the following trusts—to wit: "In trust that he the said *Thomas Ellicott*, his heirs and assigns, shall in such manner as he shall deem best for the creditors of the said bank, and acting in that particular, as well as in the entire execution of this trust, under the advice and direction of *Stevenson Archer* and *Thomas B. Dorsey*, or in case they decline to act, under the advice and direction of such other person or persons as they may name for the purpose, proceed to collect and realize the said property, estate, rights and credits, and from time to time as the same are realized, to divide the same equally and rateably among all the creditors of the said *Bank of Maryland*.—First deducting all necessary expenses of the trust, and such commissions as would be allowed to such trustee under the rules and practice of a court of chancery of this State, and in further trust after discharging all the debts aforesaid of said *Bank of Maryland*, the said trustee, his heirs and assigns will, subject to the deduction aforesaid, pay over and divide the balance which may be in his hands, among the stockholders of said bank according to their several interests in said bank."

2. A deed between the same parties of the 23d March, 1834, of the same character and import, designed to confirm the first, which was in fact executed on *Sunday*.

These deeds were respectively executed by the *President* of the *Bank of Maryland*, under the seal of that institution.

3. The third deed exhibited with the bill of complaint, was from the *President and Directors of the Bank of Maryland* and *Thomas Ellicott*, to *Thomas Ellicott*, *John B.*

Union Bank of Tennessee vs. Ellicott, Morris and Gill.—1834.

Morris and *Richard W. Gill*, and was dated the 5th April, 1834. It recited a reference to the two previous deeds, and that “*Thomas Ellicott* accepted the trusts so as aforesaid confided to him by said deeds respectively, and entered upon the execution of the same—And whereas, since the said *Thomas Ellicott* accepted and commenced the execution of said trusts, it has been deemed proper and advisable by the said *President and Directors of the Bank of Maryland*, the said *Thomas Ellicott*, and by various creditors of the said bank, that *John B. Morris* and *Richard W. Gill* of the city of *Baltimore*, should be associated as co-trustees with the said *Thomas Ellicott* for the accomplishment of the aforesaid deeds, and whereas the said *Morris* and *Gill* have agreed to be associated and act with the said *Thomas Ellicott* as co-trustees as aforesaid, and whereas for the effectuation of this object *John V. L. McMahon* and *Reverdy Johnson*, advisers and counsellors as to the execution of said trusts, appointed as such by the Honorable *Stevenson Archer* and *Thomas Beale Dorsey*, by and under the authority of the aforesaid deeds of trust, (they, the said *Archer* and *Dorsey* declining to act as counsellors and advisers of the said trust,) have advised the execution of these presents as is signified by their endorsement thereon,” and then the said deed proceeded to assign the estate granted to the said *Thomas Ellicott*, to *Thomas Ellicott*, *John B. Morris* and *Richard W. Gill*, and their heirs, and the survivor or survivors of them, and their heirs for the uses and trusts specified in the deed of the 23d March, 1834. This deed like the former was executed by the *President of the Bank of Maryland* under the corporate seal of that institution, and signed by the three trustees. The endorsement of the advisers of the trust was as follows:

“We do hereby certify that the foregoing deed of trust was prepared and executed under our order and direction as is recited therein. Witness our hands and seals the 5th day of April, 1834. *Reverdy Johnson*, (seal.) *John V. L. McMahon*, (seal.)”

Union Bank of Tennessee vs. Ellicott, Morris and Gill.—1834.

All these deeds were duly acknowledged and recorded among the land records of *Baltimore* county court.

Upon this bill the County court, (PURVIANCE, J.,) refused the injunction.

Thereupon both parties having appeared in court by their respective solicitors, filed the following agreement, viz: "The following admissions are made in this case to be used in argument by counsel on either side before the court of Appeals, or any judge thereof, to whom the application for an injunction shall be made by the complainants under the act of 1832, ch. 197.

1. It is admitted that at a special meeting of the board of directors of the *Bank of Maryland*, held in the city of *Baltimore* on the 23d March, 1834, the following resolutions were adopted by said board, preparatory to, and before the execution of the deed of trust, bearing date on that day, from the President and Directors of said bank, to *Thomas Ellicott*, which deed is referred to and exhibited with complainants' bill of complaint.

At a special meeting of the directors of the *Bank of Maryland*, held on the 23d March, 1834.

1. *Resolved*, that all debtors of this institution shall have the privilege to pay their debts to the same in notes of this bank, or in certificates of deposit, or in open accounts due by the bank.

2. *Resolved*, that a deed of trust be at once executed of all the property and funds of the *Bank of Maryland* to *Thomas Ellicott* in trust for the payment equally of all the debts and liabilities of the bank in the first place. And secondly for the distribution of any balance that may remain among the stockholders of the bank, according to their interests in said stock.

3. *Resolved*, that the cashier forthwith deliver into the *Union Bank of Maryland*, all notes and bills discounted at this institution, which when paid shall be carried to the credit of the trustee appointed to settle up the concerns of the bank.

Union Bank of Tennessee vs. Ellicott, Morris and Gill.—1834.

4. *Resolved*, that all notes and bills deposited with this bank for collection, be also delivered into the *Union Bank of Maryland*, which, when collected, shall be passed to the credit of the persons or institutions by whom the same were so deposited.

5. *Resolved*, that the banking house be not hereafter opened for the transaction of any business, and that the cashier take into safe keeping all the property of the institution.

6. *Resolved*, that the cashier of the *Bank of Maryland* make the exchanges of the morning with the other banks as usual. Present:—*Evan Poultney*, president, *Evan T. Ellicott*, *Nathaniel Williams*, *John Glenn*, *Charles E. Wethered*, *B. C. Ross*, *Reverdy Johnson*.

The publication of a notice addressed to the public, sign by the cashier of the bank, upon the 24th March, 1834, advising the suspension of the business of the bank, and the rights of debtors as to the mode of paying debts was also admitted; and that *Thomas Ellicott* accepted the trust with knowledge of the resolutions of the 23d March, 1834, and that on the 5th April, 1834, prior to the execution of the deed of that date, similar resolutions to those of the 23d March, 1834, were adopted by the directors of the bank, and that *Morris* and *Gill* were associated as trustees with *Ellicott*, with knowledge thereof before the deed to them was executed, also with knowledge of the resolutions of the 23d March, and the publication of the 24th March.

It was also admitted, that the president of said bank *was not present* at the special meeting of the directors thereof, held on the 23rd March, when the first mentioned resolutions were adopted, being then confined to his own house by reason of sickness; but that he afterwards, but before said deed was executed, assented to said resolutions so adopted, and signed his name to the proceedings adopting said resolutions.

It was also admitted that the complainants had no knowledge of the resolutions of the 23d March, and 5th April,

until about the middle of the month of *April*; and that complainants were duly incorporated by the *State of Tennessee*.

It was also admitted that, on the 2d April, 1834, *Stevenson Archer* and *Thomas B. Dorsey*, the advisers and directors appointed by and under the deed of trust of the 23d March, by the authority of that deed appointed *John V. L. McMahan* and *Reverdy Johnson*, advisers and directors of said trust; and that on the 8th April, 1834, the trustees aforesaid gave public notice to the debtors and creditors of the bank, of their obligation to receive the liabilities of the bank in payment of debts; and their intention to fulfil it.

The complainants being refused the injunction sought by the bill, the record was carried to the judges of the court of Appeals, under the act of 1832, *ch. 97*.

It was agreed, that if the judges of the court of Appeals, to whom the said application for an injunction may be made, or a majority of them shall be of opinion that the *trustees were, and are authorised* to receive such notes and certificates of deposit as were actually and *bona fide* the property of the person or persons offering them in payment to said trustees, at the time of the execution of the deed of the 23d March, but that said trustees were and are not authorised to receive in payment any note or certificate of deposit obtained by any debtor or debtors, after the date of the said deed of trust, then the complainant shall be at liberty to amend the prayer of the bill, in conformity with such opinion.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER, and DORSEY, J's.

G. W. Gibbs, of *Nashville*, and *Meredith*, for the appellants.

McMahan and *Johnson*, for the trustees of the *Bank of Maryland*.

BUCHANAN, Ch. J., delivered the opinion of the court.

This case being presented to us as judges of the court of Appeals, under the provisions of the Act of Assembly of 1832, ch. 197, we have fully considered the attested copy of the bill and proceedings in the same, and of the order of the judge of *Baltimore* county court refusing the injunction prayed for by the complainants, and we have also fully considered the arguments of the solicitors of the respective parties, and are of opinion that the complainants are not entitled to the injunction prayed for, and consequently that there is no error in the order aforesaid of the judge aforesaid, refusing to award such injunction, and we therefore refuse to direct such injunction to be awarded.

It is our opinion, that the *President and Directors of the Bank of Maryland*, were authorised, and had the right to provide for the payment of the debts of the institution, by a transfer in trust of all the property of the bank; and that the deed of trust exhibited to us, of the 5th of April, 1834, to *Thomas Ellicott, John B. Morris and Richard W. Gill*, is a good, valid and effectual deed for the purposes therein expressed, notwithstanding the prior deeds of the 23d March, 1834, and the 26th March, 1834.

It is also our opinion, that antecedent to the execution of either of those deeds, it was the right and privilege of the debtors respectively of the *Bank of Maryland*, secured to them by the provisions of the acts of 1818, ch. 177, and 1824, ch. 199, to pay and discharge their debts to the said bank, in the notes and certificates of deposit issued by said bank, at the par or nominal value or amount of such notes or certificates of deposit; which right and privilege were not extinguished or lost to them, by operation of either of the said deeds, but remained unimpaired.

And that *Thomas Ellicott, John B. Morris and Richard W. Gill*, the trustees named in the deed of trust of the 5th April, 1834, are not only authorised and bound by the provisions of the acts of 1818, ch. 117, and 1824, ch. 199, independent of the resolution No. 1, passed at a special meet-

Thomas' Adm'rs vs. Vonkapff's Ex'rs.—1834.

ing of the directors of the *Bank of Maryland* on the 23d of March, 1834, and of the resolution passed at a special meeting of the directors on the 5th April, 1834, or either of them, relative to the privilege of debtors to the bank, to pay such debts in the notes and certificates of deposit issued by the bank, to receive such notes and certificates at their par or nominal amount or value, in payment of debts to the bank, as the bank itself would have been bound to receive them, if no such resolutions had been passed, or deed of trust executed, whether obtained before or after the execution of the said deeds or either of them, by the debtor or debtors to the bank offering them in payment of their respective debts.

JOHN BUCHANAN,
JOHN STEPHEN,
STEVENSON ARCHER,
THOMAS B. DORSEY.

DANIEL L. THOMAS' ADMINISTRATORS vs. B. J. VON-
KAPFF'S EXECUTORS.—*December, 1834.*

In a mortgage of real property given to secure the repayment of \$20,000, borrowed money, T, the mortgagor, covenanted that he would at all times, during the existence of the lien hereby created, at his own proper cost and charge, cause and procure, the insurance against loss by fire already effected on the mortgaged premises to amount of \$19,000, to be kept up and renewed; and that in case of loss, the sum insured shall be immediately applied to rebuilding, replacing and putting the said property and premises in the like good order and condition that the same now are in, so that the said V, (the mortgagee) his heirs, &c. shall in case of loss by fire be benefitted by such insurance, or participate in the benefit thereof, to the extent of his aforesaid lien."—Upon the construction of this contract, IT WAS HELD,

1. That the parties evidently looked to the estate mortgaged, if it remained without deterioration, as sufficient to satisfy the debt which it was taken to secure.
2. That the design of this covenant was by the insurance, always to have a fund for re-establishing the premises, so that the security should not be in any manner diminished.

Thomas' Adm'rs vs. Vonkapff's Ex'rs.—1834.

3. The insurance was one for the benefit of the mortgagee, to the extent of his lien. He was not entitled to the money, but to have it applied to the rebuilding of the premises in the like good order in which they were at the time of the contract, and such an application of the money would be coerced in equity, which would consider the mortgagor, if he received the insurance money, as a trustee for that object.
4. That as the mortgaged property was clothed with a trust in reference to this fund, the legal representatives of the mortgagor must also take it subject to the trust.

Where property was mortgaged to secure a certain sum of money, and afterwards the improvements on it being destroyed by fire, was sold and did not pay the mortgaged debt; and the mortgagee then applied to a court of equity to enforce a covenant in the mortgage to keep the property insured, and apply the proceeds of the policy to rebuilding it, claiming under that covenant, a lien upon the insurance money, and payment of the balance due him out of it—HELD, that although equity could not administer the relief in the terms stipulated for, as the property was sold, and rendered rebuilding by the mortgagor or his representatives impossible, yet still the creditor was entitled to be paid out of this fund, over which he had a qualified lien, in preference to the general creditors of the debtor or his representatives.

Covenants to repair and rebuild on the land, are covenants running with the land; and so is a covenant to effect insurance and apply the proceeds in case of loss by fire, to the reparation of the insured property.

When a party is entitled to relief in equity, but from some cause it cannot be obtained in the *mode* stipulated for between the parties, chancery will still grant relief, though in some other form than the one agreed upon.

APPEAL from the equity side of *Baltimore* county court.

The appellees on the 30th of November, 1831, exhibited their bill in *Baltimore* county court, against the appellants, praying that the sum of \$10,000, which had been deposited by the intestate of the appellants, in the *Maryland Savings Institution*, might be paid to them. The bill alleged, that the plaintiffs' testator, had loaned to the defendants' intestate the sum of \$20,000, and as a security for the repayment of the same, with interest, the latter had executed to the former a mortgage dated July 6th, 1827, on a certain lot and improvements in the city of *Baltimore*. That the mortgage contained a covenant, that the mortgagor, or his representatives, would at all times, during the continuance of the lien,

Thomas' Adm'rs vs. Vonkapff's Ex'rs.—1834.

procure the insurance against loss by fire, then effected on said improvements, &c., to the amount of \$19,000, to be renewed, and that in case of loss, the sum insured should be immediately applied to rebuilding the premises, &c. That in the winter of 1830, the most valuable of the improvements on said lot were destroyed by fire, at which time the insurance amounted to \$10,000, and that the same was subsequently paid by the insurance office, to the mortgagor. That the said mortgagor deposited the money in the *Maryland Savings Institution*, until he could decide whether he would apply it to rebuilding the premises, or to the extinguishment in part of the mortgage debt, and that it remained on deposit until the period of his death. That after ascertaining that the administrators of the mortgagor were unwilling to apply this money to the extinguishment of the mortgage, the complainants filed a bill, and obtained a decree for the sale of the premises, which, owing to the injury done to them by the fire, produced the net sum of but \$8,225 69, so that the aforesaid \$10,000 will not satisfy the residue of the mortgage debt.

The answer, after admitting the allegations of the bill, presented to the court the question, whether the complainants in virtue of the mortgage, held a specific lien on the fund in question, or whether the same should not be distributed equally among the creditors of the mortgagor, who the defendants alleged, died insolvent.

Among the exhibits filed by the complainants, was the following paper signed by *Thomas*, addressed to and left with the treasurer of the *Maryland Savings Institution*, at the time of making the deposite.

“April 27th, 1830, I wish to deposite in the *Maryland Savings Institution*, a check of the *Firemen's Insurance Company*, for \$10,000, and to receive for this sum, a certificate bearing interest at four per cent. It is my intention, this sum should remain in your institution until I can decide upon whether I shall have to use it for the rebuilding of my sugar refinery establishment, or have to transfer the same to

Thomas' Adm'rs vs. Vonkapff's Ex'rs.—1834.

the executors of the estate of *B. J. Vonkapff*, for the payment of a mortgage held by this estate on my property."

The covenants in this deed, to insure, and to rebuild, in case of loss, are recited by the learned judge who delivered the opinion of this court.

The county court (*HANSON, A. J.*) decreed that the complainants had a specific lien on the money so deposited in the *Savings Institution*, and that the same, with interest, at the rate of four per cent., be brought into court, to be applied to the payment of the balance of their claim.

From this decree, the defendants prosecuted the present appeal.

The cause was argued before *BUCHANAN, Ch. J.*, and *MARTIN, STEPHEN*, and *ARCHER, J's*.

Johnson, for the appellants.

1. The appellees had no specific lien on the fund, and as the appellants' intestate died insolvent, it should have been equally distributed among his creditors. A covenant to pay in a mortgage is collateral, and does not run with the land. 8 *Taunt.* 227. 1 *Cov. Powel*, 61, (note E.) *Sugden* 477, 481.

2. The mortgage itself, with the paper deposited with the *Savings Institution*, did not amount to a lien on the fund. If a mortgagor in his life-time, sets apart a certain sum for the payment of the mortgage debt, that does not amount to a specific appropriation of the money, so set apart for that purpose. The object of the covenant in the mortgage, was to provide for the rebuilding of the premises, and not for the payment of the debt, and therefore, when *Thomas* received the money from the *Insurance Company*, the mortgagee could not have recovered it from him. 2 *Durnf. and East.* 211. If the mortgagor had rebuilt with other funds, this fund would have been his, as his personal right. It does not appear but that the \$10,000 was more than adequate to to restore the property to its former state, which is every

thing the mortgagee had a right to ask; nor is there any evidence, that *Thomas* was in his life-time called on to rebuild. If the mortgage *per se*, constituted a lien on the fund, then the mortgagee would be entitled to it, though the mortgagor should rebuild. Suppose, notwithstanding the injury, the property had been sufficient to pay the debt, will it be pretended that the mortgagee could have insisted on the application of this money for that purpose. The policy therefore, cannot be regarded as a substitute for the property, or in other words, the insurance money is not the primary fund for the payment of the debt.

The mortgage then did not create a lien, nor did the memorandum signed by *Thomas* when he made the deposite; as notwithstanding the memorandum, the bank could pay the money to no one but himself. There was nothing in the declaration accompanying the deposite which made it the duty of the bank to see to the application of the money.

McMahon, for the appellees.

1. The mortgaged premises having been sold, the money cannot be applied to rebuilding them, and the question therefore is, how shall it be applied. The mortgagee has the same right to the insurance money as he would have to the premises themselves. He is the legal owner of the premises, and every thing which attaches to them, and enhances their value, also belongs to him, though acquired subsequently to the mortgage. 1 *Powel on Mortg.* 189, (note 2.) The mortgagor may insure to the full value of the property, as in *equity*, he is considered the owner, subject to the charge. His right to insure depends upon his interest, which being subject to the charge of the mortgagee, the proceeds of the policy should be applied to the payment of the charge. The money must be applied, as the estate is to go. 2 *Madd. Rep.* 481, 482, 486.

2. The covenant to insure, makes it the duty of the mortgagor to do so, for the benefit of the mortgagee, as an additional security for his debt. Such a covenant would hardly

be required by the mortgagee, if the mortgagor is to have the benefit of it. It could not be to create a personal responsibility on the part of the mortgagor, as that responsibility exists independently of any such covenant. A court of equity will not relieve against the consequences of the non-performance of a covenant to insure, though a forfeiture results. 19 *Ves.* 133, 143. 2 *Merrivale*, 459. 4 *Campb.* 177. A covenant to insure does run with the land. 7 *Serg. and Low.* 1. *Cov. Powel*, 187.

3. But at all events, the covenant to rebuild, gives the mortgagee a clear right to the fund, if from the default of the mortgagor, he cannot comply with his covenant. Such a covenant creates a lien, and follows the fund in the hands of the assignees. 2 *Durnf. and East.* 206, 211. 2 *Merrivale*, 511. It is in a court of Chancery, an appropriation of the money to the use of the mortgagee.

4. But if not an actual appropriation, it is an agreement to appropriate, and that in Chancery creates a trust for the benefit of the mortgagee, as against the mortgagor, and all claiming under him. 1 *Ves. Jr.* 477. 3 *Ves.* 58. 2 *Desauss*, 552. 3 *Powel on Mortg.* 1000, 1449. 2 *Ib.* 434.

5. When the money was deposited in the bank, it was dedicated by the mortgagor, either to rebuild the premises, or to the satisfaction of the mortgage debt; and as it cannot now be applied to the former object, because of the mortgagor's default, in suffering the property to be sold, it follows that it must be applied to the payment of the mortgage. 2 *Durnf. and East.* 210.

ARCHER, J., delivered the opinion of the court.

The answer admits that the buildings on the premises insured, were burned down, whereby the security of the mortgage was impaired; and that the sum of \$12,000 remained due on the mortgage after the application to its discharge of the proceeds of the sale of the mortgaged premises. It is also admitted, that a decree in equity has been

passed for the sale of the mortgaged premises, and that they have in pursuance of said decree been sold, and that the proceeds of the sale have been applied towards the payment of the mortgage.

From this statement of facts it will appear, that the power of *Thomas*, or his legal representatives, to comply with the covenant, by rebuilding, is gone; the right to the property having passed from them. Upon these admitted facts, it would seem only to be necessary to recite the covenant contained in the mortgage deed from *Thomas* to the defendants to decide the question. That covenant is as follows.

“That the said *Daniel Thomas*, his heirs, executors, and administrators, shall and will at all times during the existence of the lien hereby created, at his and their own proper cost and charge, cause and procure the insurance against loss by fire already effected on the buildings, improvements and fixtures and utensils aforesaid, to amount of \$19,000, to be kept up, continued, and renewed; and that in case of loss, the sum insured shall be immediately applied to the rebuilding, replacing, and putting the said property and premises in the like good order and condition, that the same now are in, so that the said *Bernard J. Vonkapff*, his heirs, executors, administrators, or assigns, shall in case of loss by fire, be benefitted by such insurance, or participate in the benefit thereof, to the extent of his aforesaid lien.”

The parties evidently looked to the mortgaged estate, if it remained without deterioration, as sufficient to satisfy the debt, which it was taken to secure. It is under this belief the above covenant is entered into. It was foreseen that the security might be lessened by the calamity which actually befel it, and the design of the covenant was, by the insurance, always to have a fund for re-establishing the premises; so that the security should not be in any manner diminished; for they stipulate in case of loss by fire, that the sum insured shall immediately be applied to the rebuilding, replacing, and refitting the property, in the like good order,

that the same was in at that time; so that in case of loss by fire, the mortgagee might be benefitted by such insurance, or participate in the benefit thereof to the extent of his lien.

The insurance, then, according to the express agreement of the parties, was one for the benefit of *Vonkapff*, to the extent of his lien. He was not, it is true, entitled to the money, but he was entitled to have it applied to the rebuilding of the premises, in the like good order which they were at the time of the contract, and it cannot be questioned but that such an application of it might have been coerced. When the mortgagor received the insurance money, a court of equity would have considered him in the light of a trustee of the fund, and would have caused the whole of it, or such parts thereof as might be necessary, to restore the premises to their former situation to be expended in rebuilding. The mortgagee had undoubted rights in the fund thus arising, which could not be over-reached by *Thomas* or his creditors, and if the property was thus clothed with a trust, his legal representatives must also take it subject to the same trust.

This being so, and the restoration of the buildings by *Thomas*, or his representatives, having become impracticable; the estate having passed from them, the question to be determined is, to whom the fund arising from the insurance belongs?

Equity cannot administer relief in the terms stipulated for; that has become impossible. But shall it therefore be said, that although the insurance was taken for the benefit of the mortgagee, it shall go into the mass of the mortgagor's estate, and be distributed to his creditors generally? This would be doing great injustice to the mortgagee, who would thus be stripped of all advantages and priorities which he would otherwise have had by the contract; and the insurance money, instead of being applied in conformity with the contract, to make good the lien, would in opposition to the agreement of the parties, be a fund for the benefit of *Tho-*

Thomas' Adm'rs vs. Vonkapff's Ex'rs—1834.

mas and his representatives, instead of being for the benefit of the mortgagee.

The whole insurance money, added to the sale of the mortgaged premises, it appears, is not sufficient to extinguish the mortgage, or in the language of the contract, if allowed to take the whole, he will not "be benefitted to the extent of his lien." His lien will not be satisfied.

If therefore the fund of \$10,000 had according to contract been expended on the premises, it would not have placed them in the same condition they were at the time of that mortgage; for the parties then considered the premises to be worth \$20,000. And if the whole extent of the insurance money would not have reinstated the premises, and *Thomas* was bound to lay it out for the mortgagee's benefit, and that has become impracticable, would that not be an obvious equity, which would give him the right to the money itself, which was to be expended manifestly for his benefit solely.

If indeed, the expenditure of this amount, thus recovered, upon the premises, would have enhanced their value beyond the lien, then to the extent of such enhancement, the fund would be for the benefit of *Thomas'* representatives. And if such had appeared to have been the case, we should have considered the mortgagee as only entitled to such sum as would have brought up his security to its former standard; or in other words, only to such portion of the insurance fund, as would have satisfied his lien; the rest would have belonged to *Thomas'* representatives.

But we will examine this question in another view, which will be found to be equally conclusive of the rights of the parties.

The mortgagor as between him and the mortgagee, had in virtue of the covenant to keep up the insurance, a qualified lien on the amount of the insurance: that is, he had a right which attached itself to the fund, not a right to be sure, which could divest the mortgagor of its possession, but a right, which would cling to the fund until it was expended

for his benefit,) to the extent of his lien under the mortgage. The mortgagor in his life-time could never have diverted this fund from its destined object. It would pass to his administrators, clogged with the same qualified equitable lien, with which it was encompassed in the mortgagor's life-time. If indeed this fund had been passed over by the mortgagor, for a valuable consideration without notice, to a third person, such third person's right would prevail, because he would have an equity also; and having the possession, he would be protected therein. For as the court of *King's Bench* say, in *2 T. R.* 210, the title of him who hath both a fair possession, and an equitable title, shall be preferred to that of a mere equitable interest. But here, the administrators have a mere naked legal right, subject to the mortgagee's equity. That the administrators represent the creditors, cannot change the character of this equity of the mortgagee, or weaken its efficacy. The particular creditor, and the general creditor, stand in different attitudes. The former never trusted to the personal credit of the mortgagor, but trusted and looked to this particular fund, to satisfy his debt or give him security for it. The general creditors trusted to a personal credit alone. What has produced this fund? The advance of money upon its faith. Now if it be abstracted to the extent of the money advanced, the general creditors can have no right to complain, for their debtor is precisely in the same situation as if the money had never been advanced, and consequently the insurance effected. But again, the covenant is expressly for the benefit of the particular creditor, not for the benefit of the general creditors, and if they participate in it, they get that which they never could have looked to, and the extent to which they derive advantage from it, to the same extent, do they take from that creditor who looked exclusively to it. In this aspect of the case, there is another view against the pretensions of the general creditors. That this is a covenant running with the land, can, we think, scarcely be doubted. The covenants to

Thomas' Adm'rs vs. Vonkapff's Ex'rs.—1834.

repair and rebuild are admittedly so. And what is this, but in effect a modified covenant to repair and rebuild? The insurance is to be kept up, so that in case of loss by fire, the sum insured shall be immediately applied to rebuilding the property on the premises. Being of this character, it would run with the land, just as would an ordinary and absolute covenant to repair or rebuild; and running with the land, the record of the mortgage would be notice to all the general creditors, and they would, therefore, have no just pretensions to participate in the fund, to the prejudice of the particular creditor.

We have said that although a lien existed, it gave no right to the possession of the fund, as against *Thomas*; the design being to apply it for the purpose of reinstating the premises. But the facts show that the lien cannot in the terms of the contract be specifically enforced, owing to the sale of the mortgaged premises. A court of equity, however, is not on this account powerless. It must administer relief, in the only manner in which it can now be done. As the leading object in effecting the insurance, was exclusively a beneficial one to the mortgagee, its great spirit and object will be effectuated by decreeing him the fund. The mode only, of giving relief, will be changed, and that has become inevitable.

We have not considered it necessary to express any opinion on the legal effect of the declaration of *Thomas* accompanying the deposit of the money, as the cause is settled by the above considerations.

DECREE AFFIRMED WITH COSTS.

EDWARD DENNISON vs. PARKER H. LEE and WIFE.—
December, 1833.

Where a money rent is reserved in a lease of land, payable on a certain day, and is not paid, it carries interest as a matter of right.

A distress can only be made for the rent itself—interest on rent in arrear cannot be distrained for—but in an action of debt for the rent, interest is recoverable.

APPEAL from *Baltimore county court.*

This was an action of *Debt*, instituted by the appellees against the appellant, on the 15th of September, 1823, for rent in arrear, reserved on several leases, bearing date May 30th, 1807. The appellant was in possession of the demised premises, as assignee, of one *Joel West*, the lessee, and the suit was brought by the appellees, as guardians, of certain minors, the owners of the fee, in whose behalf the leases were executed, by an order of the *Orphans court* passed in virtue of a special act of the *General Assembly of the State*. The rent was made payable annually, on the 1st day of November, in each and every year, during the continuance of the lease, which contained the following clause of re-entry, &c. &c. "And if it shall happen, that the said yearly rent, or sum of \$——, shall be in arrear and unpaid, for the space of sixty days next after the time on which the same is above reserved to be paid, the same being first lawfully demanded, that then it shall be lawful to and for the said, (the lessor, &c.) or any of them, or any of their heirs or assigns, into the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess, occupy and enjoy, as in her or their former estate, until all such arrearages of rent, with legal interest therefor, and all expenses therein incurred, shall be fully satisfied and paid, or make distress therefor, at her or their option. And further, if it shall happen, that if the said rent shall be in arrear and unpaid, for the space of six months, that then, and in such case, this

indenture, and every clause, matter and thing therein contained, shall be null and void, and of no effect.”

There was a judgment by consent, for the plaintiffs, to be released on payment of the rent in arrear to be ascertained by the auditor, and interest on the sum so to be ascertained, if under the lease and circumstances of the case the court should be of opinion, that interest ought to be charged.

The auditor reported the amount due, and the county court gave judgment for the same, with interest thereon until the money should be paid.

From this judgment, the defendant prosecuted an appeal to this court.

The cause was argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, and ARCHER, J's.

Mayer and Johnson, for the appellant, contended.

1. That the claim *per se*, does not bear interest so as to authorise the court to charge it. 4 *Harr. and McHen.* 463, *Newson vs. Douglass*, 7 *Harr. and Johns.* 417. Interest is not chargeable upon rent. 1st. Because rent is in the nature of interest. 2nd. Because of the privileges granted to landlords, for the recovery of their rent. And 3d. Because rent is only payable when demanded. *Plowden*, 71. Upon a *distress* for rent, interest is not recoverable. 6 *Johns. Rep.* 43. 1 *Saund. Rep.* 241. 2 *Strange*, 900. *Salk.* 596, 597. 2 *Wm. Black. Rep.* 837. 1 *Hen. Black.* 441. 1 *Camp. Rep.* 50. 2 *Ib.* 426. The whole of the contract is to be taken together, and as the right to re-enter is to be preceded by a demand, so also must there be a demand before a suit can be brought for the rent. If the principal sum be paid at the time of the demand, the right of re-entry is defeated. The landlord can only recover in an action, the same sum for which he could have exercised the remedy of re-entering. If the principal sum had been paid at the time the suit was instituted, the right of re-entry

Dennison vs. Lee and Wife.—1834.

would have been destroyed. The remedy by re-entry is co-extensive with the remedy by action for the rent. No more can be recovered by the latter proceeding than by the former.

The tenant is obliged to be on the premises with the rent, when it becomes due, as otherwise he might lose his estate by a re-entry, or be exposed to a distress; and it would be hard to compel him to incur these risks, by going in search of his landlord to pay the rent. Suppose there had been a distress, or re-entry, and the tenant had paid the amount due at the time, such assignment could be pleaded in bar to an action on the covenant for the rent.

In the eye of the law the land is the capital, and the rent the interest for its use; and consequently, the allowance of interest on the rent is compounding it.

Heath and Speed, for the appellees.

The rent, by the terms of the covenant, is payable on a day certain, with a stipulation for the payment of interest, if it shall be in arrear, and there is no necessity for making a demand before levying a distress, or an action on the covenant for the rent; though the landlord is required to do so, before he can re-enter. It is a contract then, for the payment of money on a day certain, and interest is payable as a matter of law. 2 *Bos. and Pul.* 3. 2 *Brown's Ch. R.* 3. 9 *Johns.* 71. 5 *Cowen*, 607, 611. 7 *Harr. and Johns.* 417.

BUCHANAN, Ch. J., delivered the opinion of the court.

This is an action of *Debt* for rent in arrear reserved on several leases. And the single question presented for the consideration of the court is, whether interest is legally chargeable on the rent in arrear.

Looking to the clause of re-entry in each of the leases, it would seem to contain a virtual stipulation, that the rent reserved should bear interest; not merely from the time at which a re-entry is authorised, as contended for on the part of the appellant, but from the time of its becoming due.

Elizabeth Ann Hall vs. Hall, et al.—1834.

But without stopping to examine very closely what is the proper construction of the clause of re-entry, it is sufficient to say, that in *Newson's Administrator vs. Douglass, 7 Harr. and Johns. 417*, it has been settled by this court, that interest is recoverable as of right upon contracts in writing to pay money upon a day certain; as upon bonds, bills of exchange, or promissory notes, though there be no express reservation of interest. And applying the decision in that case to this, it is conclusive of the question. It is true that interest on rent in arrear cannot be distrained for, the distress can only be made for the rent itself. But this is an action of debt, for a stipulated sum of money payable at a day certain; and cannot in principle, we think, be distinguished from *Newson's Administrator vs. Douglass*.

JUDGMENT AFFIRMED.

ELIZABETH ANN HALL vs. THOMAS L. HALL, et al.—
December, 1834.

However it may be proper as a general rule, that the court shall adopt the language of a motion for instruction as preferred by counsel, yet if this court can perceive that full and substantial justice has been done to the party, by declaring the law accurately, and in terms explicit and intelligible to the jury, *upon the points raised by counsel*, it is no ground for reversing the opinion, that such instruction were not given in the words of the motion or prayer.

S conveyed to G several tracts of land, and personal property, to be held by G in "trust for the use of S during his life; and after his death, in trust for his daughter E and her four children, share and share alike as tenants in common." Upon the death of S, the trustee went into full possession of the whole property, and soon after requested E to take possession of the farm, agreeing with her at the time, that she and her children, should eat and wear, each, her and his, fifth part of the proceeds of the property under the deed of trust; reserving to himself, G, the right at all times to manage and control all the trust property by himself and agents. Under these circumstances E with her children went upon a farm, part of

Elizabeth Ann Hall vs. Hall, *et al.*—1834.

the trust property :—HELD, that the right of management reserved to G, was to be exercised during E's possession ; that it did not authorise him to dispossess her at pleasure, nor depute others to do it ; but was a mere right of supervision and general direction as to the course of cultivation and general conduct of the property ; and the legal effect of this agreement was *not* to create a tenancy at will, but a tenancy from year to year on that part of the premises *only*, which was secured to the children by the deed, leaving E to the full enjoyment of her absolute right of property in *her* fifth part of the estate.

The inclination of the courts has long been against that construction of a demise, which will create an estate at will.

It is the province of the court to determine the legal effect of contracts.

Where a warrant is in due form, and commands a constable to arrest a party to give security for the peace upon complaint made, the officer who executes it, has no reason to inquire into the particulars of the complaint, or whether any were made at all. It is his duty to execute it, and in doing so legally, his justification cannot depend upon the question of whether the oath of the party who applied for it was sufficient to authorise its issue.

A constable, in the execution of a warrant to arrest a party, breaks *another's* house at his peril. If it shall prove, that the party sought for is *not* in the house, the officer is a trespasser. Even where the right of possession of the occupant in fact is controverted, the officer in such case derives no justification from it.

Before an officer, with a warrant to arrest a party, breaks the door of another person in executing his authority, he should for his justification demand entrance, and the previous knowledge of the tenant of the purpose of the officer in coming to the premises, does not dispense with this demand.

The law anxiously regards the security of a ministerial officer in serving process directed to him by a competent jurisdiction : And it may happen that a magistrate issuing a warrant, may act illegally, and subject himself to an action or prosecution, while the constable will be justified.

So where a magistrate issues a warrant to one officer, who executes and returns it, and produces the body of the party who is recognised or discharged, and before the return day the magistrate directs the same warrant to another officer *who without knowledge of the previous arrest*, again arrests the party, he would be justified, although the magistrate's conduct would be illegal.

Where a warrant is traced to the hands of a magistrate, who swears to its loss, parol evidence of its contents may be given as in other cases.

Appeal from *Baltimore* county court.

This was an action of *Trespass Q. C. F.*, commenced by the appellant against the appellees, on the 15th October, 1832. The defendants pleaded not guilty.

Elizabeth Ann Hall vs. Hall, *et al.* —1834.

The plaintiff gave in evidence that all of the defendants came to the house of the witness, situate on the *Baltimore and York Turnpike Road*, and about two miles from the house and premises where the acts mentioned in the declaration were committed, at about ten o'clock on Monday night, the second day of *January*, 1832, and said, that they the defendants, were going up to *Mrs. Hall's*, the plaintiff, to take *Kilbourn*, and requested the witness, who kept a public house, to have supper ready against their return. That they the defendants returned to the house of the witness, after twelve o'clock on the same night. They said on their return, that they had been to *Mrs. Hall's* house, but that they did not find *Kilbourn*. They went and returned in sleighs. *James Blakeney*, one of the defendants, on the return of the defendants, stated, that he and defendant *Hall*, got into the house, that they gave the door a kick, and got in. That *Duncan*, one of the defendants, was a constable. And further gave in evidence by the son of the plaintiff, that the plaintiff, the witness, and the plaintiff's three youngest children, were all in the house mentioned in the declaration, on the morning of the 2d of *January*, 1832. That *Thomas L. Hall*, one of the defendants, came to the house the same morning, and demanded entrance; that the doors of the house were locked, or fastened, and that the mother denied him entrance, that said *Hall* then said, that to save his feelings, he would get some one to do it for him. That on the night of the same day, he and his mother were awakened out of sleep, about eleven o'clock at night, as witness thinks, by the noise and cries of persons around the house. That the witness first heard defendant, *Thomas L. Hall*, at the front door of the house, who cried out "open the door," and then began to beat on the door; witness thinks he well knew the voice of said *Hall*; that others cried "open the door;" that the back door was burst open by some one, witness supposes by *James Blakeney*, as he first entered into the house through that door, and went directly into the adjoining room, which

Elizabeth Ann Hall vs. Hall, et al.—1834.

was the plaintiff's bed room, where his mother then was, and said, with an oath, have you got no lights here? Make haste and get a light. That *Abraham Blakeney* had a sword. That *Thomas L. Hall* snatched the key of the chamber door of said house out of plaintiff's hand, and went up stairs, and locked the said door, when he came down and locked up the plaintiff's clothes. That while they were crying and beating at the doors, and before they got into the house, the plaintiff and the witness cried murder! And that some of the persons without, cried out "yes, (with an oath) we will murder you all as soon as we get in!" Before they entered into the house, some of them threw a club against the plaintiff's bed-room window, and broke out several pains of glass. That the plaintiff and the witness were very much frightened. That *Thomas L. Hall* told the plaintiff he meant to sleep there that night, but that he had lost the chamber door key, and told the plaintiff that if she fastened up the house again, he would do the same thing again. That witness found an axe at the front door the next morning, and saw that six or seven of the palings of the fence around the house had been broken by the defendants, or some of them, in one place, and five or six in another. That the plaintiff and all her children left the house next morning by day light, and went to *Mr. Ebaugh's* house.

The defendants then read to the jury a deed, executed on the 9th of February, 1827, from *William Hall Spicer*, the father of the plaintiff, to *Mark Grafton*, of several tracts or parcels of land, and personal property, to be held by the grantee in trust for the use of the grantor, during his life, and after his death, in trust, for his daughter (the plaintiff) and her four children, share and share alike, as tenants in common. And gave in evidence by the grantee *Grafton*, that he, *Grafton*, attended to the business of said *William Hall Spicer*, the grantor in said deed of trust, before his death. That he was requested to take the deed of trust, because of the infirmity of the old man, and the habits of intemperance of his daughter, the plaintiff. That he, *Graf-*

Elizabeth Ann Hall vs. Hall, et al.—1834.

ton, went into full possession of the whole of the property at the said grantor's death. That *Mrs. Hall*, the plaintiff, then being a widow, was living on the place, which had belonged to her husband, *Harry W. Hall*. That he, *Grafton*, requested her to take possession of the said trust property, a short time after her father's death, in April or May, 1829. That the object or intention of *Grafton* in placing her there was, and it was so agreed between them at the time, that she and the children should eat and wear, each, her, and his fifth part of the proceeds of the property under the deed of trust, reserving to himself the right at all times to manage and control all the trust property by himself and agents. That he, *Grafton*, left *Nehemiah Price*, *Edward Hall*, *Thomas L. Hall*, and *Mr. Morthland*, to be occasionally in attendance on the property during his absence. That *Kilbourn* went to live with *Mrs. Hall* in the spring of 1831; that he was there some time before he, *Grafton*, knew it; that he thought it was wrong, but he hoped *Kilbourn's* own good sense would induce him to leave the place; that in the latter part of December, from 29th to 30th, he, *Grafton*, was before *Walter Worthington*, a justice of the peace in *Baltimore* county, to make complaint again *Kilbourn*. That he, *Grafton*, having been informed that *Mrs. Hall* had gone to town, and that the children were not on the place, he gave the following power of attorney in the afternoon of the 31st of December, to *Thomas L. Hall*, to take possession.

“To all whom it may concern, be it known, that I do hereby constitute and appoint *Thomas L. Hall*, as my manager and agent, to act and transact for me, and in my place, in all manner of things and management of the farm and negroes, stock, plantation utensils and furniture of every kind, on the farm and plantation formerly owned by *William Hall*, alias *William Hall Spicer*, deceased, which property was by said *William Hall* conveyed to me, for the purposes and conditions therein specified and mentioned; and I do hereby authorise the said *Thomas L. Hall* to man-

Elizabeth Ann Hall vs. Hall, et al.—1834.

age and exercise all authority in, and on said farm, and over the negroes and property for the care taken, and management of the same, that may in his judgment be necessary, giving unto him the right of exercising the same authority that I would, or could, were I present myself. And I do hereby put him in full possession of the place, and all the property as above, so to manage for me, and for my use, subject, however, to any further or other order from me, or by me, as I may judge expedient. This power and authority to be, and remain in force until by me revoked. Witness my hand and seal, this thirty-first day December, eighteen hundred and thirty-one. M. GRAFTON, [Seal.]”

The defendants further proved by *Walter Worthington*, that as a justice of the peace, he issued a state warrant, on or about the 22d December, 1831, for the arrest of *E. G. Kilbourn*, upon the complaint of *Mark Grafton*. *That the warrant and complaint are lost, thinks they were lost in June last.* The defendants offered by said *Worthington* to give parol evidence of the contents of said complaint, which was made on oath, and reduced to writing upon the same paper with the warrant, and also parol evidence of the warrant itself. To which evidence, the plaintiff, by her counsel objected, but the court over-ruled the objection; and the said witness testified, that he thought it was on *Friday* before *Christmas*, that *Mr. Grafton* made oath that he had good cause to fear, and was afraid that a certain *E. G. Kilbourn* of *Baltimore* county, would do his person, and property, which he had in trust from *William Hall*, deceased, as by the deed of trust is expressed, certain injury, and craved the protection of the law; that on the same piece of paper, which contained the said oath reduced to writing, then followed the warrant to arrest *Kilbourn*, directed to any sworn constable, returnable forthwith, before said *Worthington*, at *Smyser's* tavern. *Kilbourn* appeared and applied for for a continuance until the 30th, when *Grafton* appeared; thinks he witness required *Kilbourn* to enter into a recognizance; does not recollect in what amount, but

Elizabeth Ann Hall vs. Hall, et al.—1834.

thinks he told him the amount must be in proportion to the character of the offence; that *Kilbourn* did not enter into a recognizance; and not wishing to commit him, took his recognizance in \$100, that he should appear next day at *Mallony's*; on the 31st, he, *Worthington*, appeared at *Mallony's*, and waited until he heard that *Kilbourn* and *Mrs. Hall* had gone to town; that afterwards on the second or fourth of January following, after the meeting at *Mallony's*, that said warrant which had been returned by *Adam Sharer* on the 30th December, 1831, when *Kilbourn* appeared as above mentioned, was altered, so that it was directed to ——— *Duncan*, or any sworn constable, and without any other alteration, it was delivered to defendant, *Thomas L. Hall*; that two or three days after the alleged trespass, he *Worthington*, went upon the place to value the property; that he particularly examined the property to see what injury had been done; as he had heard that considerable injury had been done; that he did not examine the palings, nor the windows; that he delivered the said warrant, when it first issued, to *Mark Grafton*, and it was then addressed to any sworn constable; that he was applied to by *Thomas L. Hall*, to go to the place to appraise the property, could not see any glass broken in the bed room; there was no return day in the warrant as it first issued—it was returnable forthwith. Said *Worthington* further testified, that his recollection, respecting the oath of *Grafton* first made before him, may not be as distinct as he could wish; that when he was going on, administering the oath, when he came to the part expressing his, (*Grafton's*) fear to his person, that *Grafton* stopped him, and objected, but afterwards thinks, upon some remarks made by him, witness, that he consented to include, fear of his person, and he distinctly recollects, that he did make oath to his personal fear.

The plaintiff then gave in evidence by *Elbridge G. Kilbourn*, that a day or two before the 29th December, 1831, *Adam Sharer*, constable, served upon him, *Kilbourn*, a warrant, requiring him, the said *Sharer*, to have him, *Kilbourn*,

Elizabeth Ann Hall vs. Hall, et al.—1834.

before *Walter Worthington*, at *Smyser's* tavern, on the 29th December; that he, *Kilbourn*, wrote a copy of the complaint, which preceded the said warrant, and which was on the same paper—that the following is the copy of said complaint, in his own hand writing, and comprises all that he wrote.

(Copy.) State of *Maryland*, *Baltimore* county, sc.

Whereas, *Mark Grafton* has, this 23d day of December, 1831, appeared before me, the subscriber, a justice of the peace for *Baltimore* county, and made oath on the Holy Evangels of Almighty God, that he has great reason to fear and is afraid, that a certain *E. G. Kilbourn*, of *Baltimore* county, will do his property, which he had in trust from *William Hall*, deceased, for the purposes, as by said trust is expressed, certain damages and injury, contrary to the peace, and good order, and dignity of the state of *Maryland*, and therefore prays the protection of the law.

W. Worthington.

To *Adam Sharer*, constable.

That he wrote in haste, but believes he made an exact copy of the original as far as he wrote, except that he thinks, that the name of *Walter Worthington*, was signed in full; that he and the constable, *Sharer*, who was present when witness made the copy, compared it with the original after it was made, and found it correct; that witness afterwards heard the original read over by *Walter Worthington*, or when witness appeared before him on said warrant. That witness does well recollect the substance of the original warrant, and the complaint therein recited, independently of the said copy, and he is confident that there was not in the original, any thing expressed about *Grafton's* fear to his person, but only to the property which he held in trust from *William Hall*.

He further proved, that *Grafton* agreed with the plaintiff, that she should continue to hold the farm and trust property of which she was then in possession, for *five* years from the 21st of April, 1831, for the use and support of herself and children.

Elizabeth Ann Hall vs. Hall, et al.—1834.

The plaintiff, further to support the issue on her part, gave in evidence by *Adam Sharer*, a witness, that he as constable had a warrant issued by *Walter Worthington*, for the arrest of *E. G. Kilbourn*. That said warrant was dated on or about the 23d of December, 1831, was directed to him, *Adam Sharer*, by name, and made returnable before *Walter Worthington* on the 29th of the same month, at *Smyser's* tavern; that when he served said warrant on *Kilbourn*, he, *Kilbourn*, requested a copy thereof, and that he, *Sharer*, saw the copy when it was made, (being the same mentioned in the testimony of *Kilbourn*) and compared it with the original with *Kilbourn*. That he believes it to be a true copy as far as it goes. That he is confident there was not in the complaint on the warrant any thing about the fear of *Grafton* to his person. That this circumstance, and also the circumstance of the warrant having a return day, and its being made returnable specially before *Walter Worthington*, are reasons why he recollects the contents of said warrant. That *Kilbourn* appeared at *Smyser's* on the 29th of December, 1831, the return day of the warrant, but Mr. *Worthington* was not there. That on the next day, the 30th, Mr. *Worthington* was at *Smyser's*, with *Grafton* and others. That *Worthington* sent for him, *Sharer*, and enquired where the warrant was, and *Kilbourn*; that he, *Sharer*, told him the warrant was returnable on the 29th, and that *Kilbourn* had appeared on that day at *Smyser's*. That *Worthington* at first denied it was returnable on the 29th, but admitted his mistake when the warrant was produced. That he, *Worthington*, then wrote on the back of the warrant, "continued until the 30th, returnable forthwith," and gave it to witness, and requested him to go and bring *Kilbourn* on the warrant, which witness did, he, *Kilbourn*, making no objection to going; that *Kilbourn* appeared before *Worthington*, who read the warrant over to him, and demanded of *Kilbourn*, to enter into a recognizance to the amount of \$2400, with securities, which *Kilbourn* would not do.

Upon the whole evidence, the plaintiff, by her counsel, prays the opinion and instruction of the court to the jury as follows.

1st. If the jury believe that *Mrs. Hall*, the plaintiff, was in the actual possession of the house and premises, upon which the acts were committed by the defendants as given in evidence, and at the time when they were committed, then such possession is sufficient in law, to entitle the plaintiff to maintain this action, notwithstanding the deed of trust from *William Hall* (otherwise called *William Hall Spicer*,) to *Mark Grafton*.

2d. That the paper purporting to be a power of attorney from *Mark Grafton* to *Thomas L. Hall*, dated the 31st December, 1831, did not authorise the said *Hall*, or any of the defendants to commit the acts complained of in the declaration in this cause, or of which evidence has been given to the jury, and that said paper is not a justification of those acts.

3d. If the jury believe that the warrant, or paper, which the defendant, *Duncan*, had for the arrest of *Kilbourn*, (if they find he had any in fact) on the night of the 2d of January, 1832, when the house occupied by the plaintiff was broken, &c., as stated in the evidence by the defendants, was the same warrant, or paper, which had been issued by *Walter Worthington*, upon the complaint of *Mark Grafton*, made on or about the 23d December, 1831, and if they believe that the tenor or substance of said complaint, as reduced to writing by said *Worthington*, upon said warrant, or upon the paper containing, or prefixed to said warrant, was as stated in *E. G. Kilbourn's* evidence, that then the said warrant was not a legal warrant, to authorise the said *Duncan*, or any other officer or person to arrest the said *Kilbourn*, and therefore it is no justification of any of the defendants, of the acts complained of in the declaration in this cause, or given in evidence to the jury.

4th. That if the jury should believe, that on the night of the 2d January, 1832, when the house occupied by the

plaintiff, was broken and entered by the defendants as stated in the evidence, the defendant *Duncan*, had a legal warrant for the arrest of *Kilbourn*, for an alleged breach of the peace, yet if the jury find from the evidence, that said *Kilbourn* was not in fact, in the said house at the time when it was broken, &c., on that night, then the defendants were not, and are not justified by virtue of said warrant, in breaking or entering the house, or in committing any of the acts complained of in the declaration in this cause.

5th. That although the defendant *Duncan*, had a legal warrant for arresting *Kilbourn*, for an alleged breach of the peace, at the time when defendants broke and entered the house occupied by plaintiff, as stated in the evidence, yet that such warrant does not justify the defendants, if the jury believe that they broke and entered the house at a late and unreasonable hour of the night, and without having first made known their business to the occupants within the house, and demanded entrance for the purpose of serving or executing said warrant.

6th. That although said defendant *Duncan*, had a legal warrant for arresting *Kilbourn*, for an alleged breach of the peace, at the time when the defendants broke and entered the house occupied by the plaintiff, as stated in the evidence, yet that such warrant does not justify the defendants, if the jury believe that they broke palings around the house, or broke the windows of the room in which Mrs. *Hall*, the plaintiff slept, or threatened before they entered, that they would murder all the persons in the house when they should get into it, or used profane or abusive language to her after they, or some of them, had broken and entered the house, or took from her by force the key of the chamber of said house, or locked the door of said chamber, or locked up her clothing or other goods, and carried off, lost, or kept the key after having locked up the said chamber, or threatened to break the house, and commit the like acts again, if she, the plaintiff, locked or fastened the outer doors of the house after the defendants should have gone out of it, be-

cause such acts were unnecessary to the lawful execution of such warrant, even if *Kilbourn* had been in the house, and because such acts were an abuse of the authority granted by such warrant, and if committed by defendants, they were trespassers, notwithstanding such warrant might have been in all respects, regular, legal, and valid.

7th. That the deed of trust from *William Hall Spicer* to *Mark Grafton*, offered in evidence, conferred no right upon *Grafton*, or any other person acting under his authority, forcibly to enter the dwelling house and premises mentioned in said deed, and to dispossess the plaintiff of the possession of any part of the trust property named in said deed, and that if the jury shall believe that the plaintiff was in the possession of the trust property, either by the agreement of the trustee, or by his permission, for the purpose of cultivating the farm, and of obtaining support for herself and family, from the proceeds and use thereof, that then such possession was lawful, and neither *Grafton* himself, nor any one acting under his authority, derive any right under said deed to interrupt the same.

8th. If the jury believe from the evidence, that the plaintiff was put in possession of the trust property by *Grafton*, and continued therein by his approbation, from year to year, that then she occupied the premises, from year to year, and it was not competent for said *Grafton* to terminate her possession, without six months previous notice to remove.

9th. That if the jury from the evidence believe, that *Thomas L. Hall* did enter into said premises in possession of the plaintiff, by virtue of the power of attorney from *Mark Grafton*, offered in evidence, while the plaintiff was in possession of the same, yet if they also believe from the evidence, that the said *Hall* left the premises, and during his absence the plaintiff also went away for the transaction of her business, with the intention of returning, leaving all her goods, furniture, servants and other property in the premises, and that she did return on the next day, and uninterruptedly enter into possession thereof, and that she contin-

Elizabeth Ann Hall vs. Hall, et al.—1834.

ued, and was in possession at the time the trespass complained of was committed, that such absence was not an abandonment in law of her possession or right of possession, so as to preclude her from maintaining this action against the defendants.

10th. The deed of trust from *William Hall Spicer* to *Mark Grafton*, being the only evidence now offered to the jury, which confers any right upon the said *Grafton*, in relation to the trust property, mentioned in said deed, that the testimony of said *Grafton* is wholly inadmissible to prove any right in himself, or his agents, to interfere with the use and possession of said property, contrary to the terms and conditions of said deed.

11th. That if the jury believe from the evidence, that the warrant issued by *Walter Worthington*, against *E. G. Kilbourn*, upon the complaint of *Mark Grafton*, was served upon *Kilbourn* by the constable *Sharer*, and was returned by *Sharer* to the justice, together with the body of *Kilbourn*, and that the said justice took the recognizance of said *Kilbourn*, to appear before him at a subsequent day, to enter into security to keep the peace upon said complaint, that then such warrant was *functus officio* and could not again be re-issued to another officer, to arrest the defendant, but the remedy to bring him again before the magistrate, on his failure to appear at such subsequent day, is upon his recognizance.

12th. *Walter Worthington*, a witness on the part of the defendants, while under examination, having testified that the original warrant, and the complaint on oath of *Mark Grafton*, on which said warrant was issued by said *Worthington*, as a justice of the peace, in the name of the *State of Maryland*, against *E. G. Kilbourn*, that he should give a recognizance to keep the peace, was last in his possession, and was lost. The defendants, by their counsel, then offered to prove the contents of said warrant and complaint, by the oral testimony of said *Worthington*; to which testimony the plaintiff objected as incompetent in law for the pur-

pose; which objection the court overruled, and admitted the evidence of said *Worthington*. All which prayers and instructions were refused by the court, (ARCHER, Ch. J.)

But the court granted the plaintiff's seventh prayer, with the following modification, to wit: "Unless the jury should believe that by the agreement with *Mrs. Hall*, *Grafton* gave her liberty to occupy the house and property at his will; but if the jury should believe that subsequently an agreement was made, such as is proven by *Kilbourn*, then the said *Hall* or *Grafton* had no right to enter upon or take possession of the premises."

And the court granted the plaintiff's eighth prayer, with the following modification and addition: "Which prayer was granted by the court with this explanation to the jury, that if they believe the testimony of *Kilbourn*, then there existed such a relation of landlord and tenant, as prevented *Grafton*, or any one acting under his authority, from terminating her possession without legal notice. But if the jury believe that *Mrs. Hall* made no other agreement, in relation to the occupation of the premises, than that which *Grafton* swears to, then he could terminate all the possessory right of *Mrs. Hall* by an entry, with the view to occupy the premises without notice, and further declared to the jury, that there was no other evidence of any agreement with *Grafton* for the occupation of the premises, than that which is sworn to by *Grafton* and *Kilbourn*.

And the court granted the plaintiff's ninth prayer, with the following modifications and additions: "Which instruction the court gave to the jury, but further instructed the jury, that although her leaving the premises, under the circumstances in this prayer mentioned, if they should be found by the jury, would be no abandonment in law, of any possessory right she may have had in the property, yet if the jury believe that *Thomas L. Hall*, previous to the time of her departure, had taken possession of the property under the power from *Mark Grafton*, and had not abandoned the possession, if it should have been thus acquired,

then all her possessory rights had terminated, as regards the defendant *Thomas L. Hall*, and all who subsequently entered by his approbation or consent, if the jury should believe that the plaintiff occupied the premises at the time of such supposed entry, under no other agreement than that proved by *Mark Grafton*."

And the court gave to the jury the following instructions and directions: 1st. If the jury believe that the defendant *Hall*, entered into possession of the premises, upon which the trespass is alleged to have been committed, by the authority of *Mark Grafton*, the trustee under the deed from *William Hall Spicer* to him, and if the jury should believe from the evidence, that the plaintiff by agreement with *Grafton*, occupied the house and premises at the will of *Mark Grafton*, then the plaintiff is not entitled to recover against the said *Hall*.

2d. But if the jury should believe that the plaintiff, by agreement with *Mark Grafton*, was allowed to occupy and possess the premises, according to the evidence of *Kilbourn*, then neither *Grafton* nor *Hall*, acting under him, could have any right to enter into possession of the premises while the plaintiff occupied the same under such agreement; and if the jury should find such entry, then the same would on his part, be a trespass, for which he would be liable in damages to the plaintiff.

3d. If the jury should believe that a warrant was issued to arrest *Kilbourn*, that he might give surety to keep the peace, although the complaint as spread on the face of the warrant is defective, yet if the jury believe that an oath was made by *Grafton*, upon which it was grounded, that he was fearful of damage to his person, and should also find, that *Duncan*, one of the defendants, acted as constable to serve said warrant, and that the other defendants were summoned by him to assist in the service of the warrant, and that the acts complained of were only such as were peaceful and necessary in their efforts to execute it, and were unaccompanied with violence, either to the person or property

Elizabeth Ann Hall vs. Hall, et al.—1834.

of the plaintiff, then the said last mentioned defendants cannot be found guilty of a trespass, although the said *Kilbourn* was not in the house of the plaintiff, or was not found by the said defendants at the time of said trespass. But if the jury should believe, that the last named defendants having to execute the said warrant, were guilty of violence either to the person or property of the plaintiff, in their efforts to serve the warrant, or that they broke open the doors of the plaintiff's house, and that she, and not *Thomas L. Hall*, was in possession thereof, without first demanding an entrance for the purpose called for by the warrant, or unless the plaintiff knew the purpose for which they came, to wit, to serve the warrant, then the said defendants are trespassers, and liable to the plaintiff in damages.

4. If the jury should believe that violence was used in the service of said warrant, or that the defendants entered without demand into the house where the plaintiff was, and that the plaintiff did not know the purpose for which they came, to wit, for serving the warrant on *Kilbourn*, still, whether the plaintiff can recover damages in this case, must depend upon the fact, whether *Mrs. Hall* had possession; for if *Thomas L. Hall* had possession, and the other defendants entered with his approbation, they cannot be guilty of a trespass.

To these opinions and instructions, with the modifications and additions of the court, to the plaintiff's 7th, 8th and 9th prayers, the plaintiff excepted, and the verdict and judgment being for the defendants, the plaintiff brought the record upon appeal before this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN and CHAMBERS, J's.

Hinkley, for the appellant.

1. The plaintiff had a sufficient possessory title to support the action. She was at the least a tenant from year to year, and not a tenant at will, and was entitled to six months

Elizabeth Ann Hall vs. Hall, *et al.*—1834.

notice to quit. 1 *Cruise Dig.* 191. 3 *Durnf. and East.* 4, 13. 8 *Term.* 3, 6. 3 *Burr*, 1609. 1 *Johns.* 322. But if a mere tenant at will, still she was entitled to a notice of six months, or at all events, to a reasonable notice. 1 *Cruise*, 191, *sec.* 19. 3 *Wilson*, 25. 1 *Pick. Rep.* 43, 49. 13 *East.* 210. 9 *Johns. Rep.* 209. 1 *Ib.* 322. 2 *Ib.* 75.

2. The warrant mentioned in the appellant's *third* prayer, was not sufficient to authorise the arrest of *Kilbourn*, and is no justification for the acts complained of. The oath upon which the warrant was founded, should have appeared upon its face, and could be proved in no other way. 2 *Strange*, 1002. 1 *Bac. Abr. title (Constable)* 690. 2 *Stark. Ev.* 817. 13 *Massa. Rep.* 286, 289. 4 *Burns' Justice*, 225, 227. 2 *Hawkins*, 5, 12 and 111.

3. But if the warrant was sufficient to justify the conduct of the defendants, in case *Kilbourn* had been in the house, it could not justify them in his absence; and the risk of his not being there was assumed by them. 1 *Hale*, 117.

4. The previous service of the same warrant by another officer, rendered it *functus officio*, and for that reason it could furnish no justification to the defendants, though the officer originally charged with its service, might legally have committed the acts complained of. 2 *Hale*, 120. 1 *Burns*, 102.

5. The power of attorney from *Grafton* to the defendants did not authorise them to proceed in the manner charged against them; nor was *Grafton* a competent witness to prove a right in himself or his agents, to interfere with the plaintiff's possession.

Johnson, for the appellees.

A tenancy at will, or at sufferance, may be created by the express terms of the parties, and according to the evidence of *Grafton*, such was the character of the tenancy of the plaintiff. 1 *Chitty Genl. Pr.* 256. 4 *Taunt.* 128. 5 *Barn. and Ald.* 604. And the instruction of the court to the jury was, that they should so find, if they believed *Grafton*.

The reservation of rent does not convert a tenancy at will, into a more permanent estate, if the parties by express stipulation so contract, and in such case no notice to quit is necessary. 1 *Pick.* 48. 2 *Wheat. Selw.* 531.

When *Grafton* reserved the right to manage and control the estate, he necessarily reserved the right to take possession of it, without which, the authority to control and manage could not be exerted. The authority conferred by him upon *Hall*, the defendant, was a legitimate exercise of this power. It was an authority to manage the estate for *Grafton*, and not to turn *Mrs. Hall* out of possession, and his right to do this latter act, therefore, is not the question to be decided. To have abandoned the estate wholly to the management of the plaintiff would have been a breach of trust.

2. If the warrant for the apprehension of *Kilbourn* was a valid one, it furnishes a full justification for the appellees; all of whom were summoned by the officer charged with the execution of it. Whether it was valid or not, depends upon whether the magistrate who issued it had jurisdiction over the subject. If he had, the form of the proceeding is altogether immaterial. *Grafton's* affidavit of personal danger gave the jurisdiction, and authorised the magistrate to issue the warrant; and there is no authority for saying that it should disclose upon its face the proof upon which it issued. 1 *Chitty Cr. L.* 27, 41. *Bac. Abr. Trespass, D. 3.*

The legal presumption is, that the warrant was in conformity with the evidence before the magistrate. If trespass can be maintained against the officer for serving this warrant, it may be likewise, against the magistrate who issued it, and *Grafton* who procured it to be issued.

It has been said that the warrant was *functus officio* after the return day, and the previous service of it by another officer. If, however, it was good upon its face, and the officer who had it, and those who aided him, were not aware of the misconduct, or mistake of the justice who issued it, they must surely be protected, and such is the instruction

Elizabeth Ann Hall vs. Hall, et al.—1834.

of the court. If a different rule prevailed, and ministerial officers charged with the service of process, and their assistants, were responsible for the mistakes of judges and justices, no man would be found willing to execute the laws.

The question of violence, was for the jury, and was properly submitted by the court to them. If the defendants had reason to believe that *Kilbourn* was in the house, they were justified in forcing their way in.

CHAMBERS, J., delivered the opinion of the court.

At the trial of this case the plaintiff's counsel made twelve points, upon which the court was asked to instruct the jury. They were all rejected.

The court then instructed the jury upon the *seventh*, *eighth* and *ninth* points, modifying the prayer of the plaintiff as is particularly stated in the exception, and then further instructed the jury in their own terms on several of the questions arising in the cause.

However, it may be proper as a general rule, that the court shall adopt the language of a motion for instruction as preferred by counsel, yet if this court can perceive that full and substantial justice has been done to the party, by declaring the law accurately, and in terms explicit and intelligible to the jury, upon the points raised by the counsel, it is no ground for reversing the opinion that such instructions were not given in the words of the motion or prayer. It is sufficient that other language was employed by the court less subject to misconception, or that the prayer was gratified with such accompanying explanations as were necessary for a full and fair comprehension of the law.

The exception professes to set out all the testimony in the cause, and the instructions were asked "upon the whole evidence."

The first instruction moved for, it has been said in argument, was intended to raise the question whether the agreement as proved by *Grafton*, between the plaintiff and himself, constituted the plaintiff a tenant at will, or tenant from

year to year, of the house and farm on which the trespass is alleged to have been committed. We do not perceive that the prayer did raise this question. It calls upon the court to say to the jury, that if the plaintiff was in actual possession of the house and premises, then such possession was sufficient to entitle the plaintiff to maintain her action. It did not assume that any of the evidence relating to a trespass was to be believed, that any act of violence against that possession, or that any specific wrong, was perpetrated. The words "upon which the acts were committed by defendants, as given in evidence," are used, but they are used as descriptive of the house and premises, and are the only words used to identify the *locus in quo*. The jury might believe the plaintiff to have been in possession, and yet not believe the witnesses who gave evidence of the trespass. It was therefore in effect to ask the court to say that the trespass was sufficiently proved, if the jury believed the plaintiff to have been in possession of the premises, which the court properly refused to do.

The court, however, after rejecting the prayer, do instruct the jury, that if they believe that the plaintiff made no other agreement, in relation to the occupation of the premises, than that which *Grafton* swears to, then he could terminate all the possessory right of the plaintiff by an entry with the view to occupy the premises without notice, and also, "that if the defendant, *Hall*, entered into possession of the premises by the authority of *Grafton*, and that the plaintiff, by agreement with *Grafton* occupied the house and premises at the will of *Grafton*, then the plaintiff is not entitled to recover against *Hall*"—And again they say, "if *Grafton* made no other agreement than that which he proves, and the defendant, *Hall*, had authority from *Grafton*, his first entry is no trespass; and having thus taken possession, his *second* entry is justified unless he abandoned the possession between the time of the first and second entry." They proceed to say in their subsequent instructions, in regard to the defence taken by those defendants

Elizabeth Ann Hall *vs.* Hall, *et al.*—1834.

who justified under *Hall's* authority, that it must “depend upon the fact whether *Hall* has made out his justification that he was in possession under authority from *Grafton*.” These opinions are grounded we think in a misconception of the nature of the tenancy of the plaintiff, and of the effect of the agreement between *Grafton* and the plaintiff, as sworn to by *Grafton*.

The inclination of the courts has long been against that construction of a demise which will create an estate at will. The interests of agriculture, and the importance to lessees of land, of certainty and security in their occupation, are opposed to such estates, and they scarcely, if at all, exist in fact. We do not think the circumstances of this case, or the intention of the parties justify such an interpretation of the relations existing between them.

Grafton took possession of the premises, as trustee under the deed. He put the plaintiff in possession, entitled to the fee simple interest in one undivided fifth part, of which she could dispose at her will and pleasure. There are no rights of control or management reserved by the deed to *Grafton*, no authority to remove her from the possession of the portion secured to her after the death of her father.

The consideration of the deed is the natural love, and affection which the grantor had for his daughter, the plaintiff, and her children. The object avowed in the deed is to make provision for them after his decease, and the means adopted is to convey to *Grafton*, in trust, to permit the grantor during his life, to take the rents and profits, and after his decease, in trust for the plaintiff and her four children, by name, and their heirs, as tenants in common, without an intimation that *Grafton* is to interpose the slightest obstacle to the complete enjoyment of the property, or the possession of it by them. Assuming then that the case is not within the statute of *Henry VIII.* and the use not executed—upon which subject we do not intend to decide—there is nothing to prevent the full and entire enjoyment of one-fifth part of the premises by the plaintiff, under the

deed, unless she has contracted to part with her interest and property in it.

To ascertain whether she did so contract with *Grafton*, it may be proper to consider the circumstances under which his agreement with the plaintiff was made. He was the guardian of the children, and their trustee. By the terms of the agreement, she was to clothe and feed the children; she was to lease the other farm on which she was residing, and to occupy these premises “with the object and intention expressed at the time, that she and the children should eat, and wear each his, and her fifth part of the proceeds of the property.” She took possession of the premises in April or May, 1829, and continued to reside upon, and cultivate it to the time of the alleged trespass, and nothing is stated to shew that she did not feed and clothe the children. The right reserved by *Grafton* was “at all times to manage and control the trust property by himself and agents.”

We think it clear this right of management and control was to be exercised during the plaintiff's possession, and that it was not a right to dispossess her at pleasure, but a right of supervision and general direction as to the course of cultivation, and general conduct of the property. The obligation to furnish food and clothing for her children, was one of daily expense; many months must elapse from the period when she took possession, before the farm could yield a crop of any kind. Could she have intended to subject herself to be removed at any moment, after pitching a crop, and cultivating it, and before it should be harvested, at any any season of the year, at any hour of the day or night. It would be, we think, in direct violation of the intention avowed, as *Grafton* swears, at the time of the agreement. He acted in reference to some supposed rights vested in him as trustee, to superintend the property, but could not be authorised by any thing in the agreement, to go or send an agent at midnight to break open the doors, destroy the windows, injure the enclosures, and lock up the clothes of the plaintiff, and treat her with rudeness. These are acts

sworn to have been committed by the defendants, and as it was not possible for the court to ascertain whether the jury could, or would not give credit to the witness, who testified to them, they must be regarded as a part of the case in reference to which the court have said the plaintiff cannot recover in the case assumed in their instructions.

It is the province of the court to determine the legal effect of contracts, and we think in this case, the legal effect of the agreement sworn to by *Grafton*, as made between himself and the plaintiff, taken in connexion with the deed of trust, was not to create a tenancy at will, as the court have assumed, as the foundation of the several opinions we have referred to—but a tenancy from year to year, in that part of the premises which was secured to the children by the deed, leaving the plaintiff in the full enjoyment of her absolute right of property in her fifth part.

The second point upon which the plaintiff asked the instruction of the court was, “that the paper purporting to be a power of attorney from *Grafton* to *Hall* did not authorise any of the defendants to commit the acts complained of in the declaration, or of which evidence has been given to the jury.”

Considering the expressions, “acts complained of in the declaration, or of which evidence has been given,” to be understood as referring to the acts of violence and injury to the premises, and the insult to the person of the plaintiff sworn to by the plaintiff’s witnesses, we have disposed of this question by what has been already said, from which it follows that the court erred in not giving the instruction.

The third point relates to the warrant issued by the magistrate against *Kilbourn*.

The prayer is that if the jury believe the tenor or substance of the complaint as reduced to writing upon said warrant, or upon the paper containing or prefixed to said warrant, was as follows, then setting out in *hæc verba* the affidavit on which the warrant issued, that then the warrant was not a legal warrant, and would not justify the defend-

ants. This application manifestly and erroneously assumes that the regularity of the complaint, which is the oath of the person at whose instance the warrant issues, must determine the authority of the officer who executes the warrant.

Now if the warrant were in due form, that is, if it commanded the constable to arrest the party, to give security for the peace upon complaint made, the officer who executed it had no reason to inquire what were the particulars of the complaint, or whether any were made at all. It was his duty to execute the warrant, because upon its face it disclosed a case of which the magistrate could take cognizance. The warrant is not set out in the evidence, and therefore this court cannot express an opinion upon its sufficiency, but we think the court properly rejected the prayer to declare the warrant illegal, and not sufficient to justify the constable, solely because the complaint was not such as to justify the magistrate in issuing it.

The *fourth* prayer assumed the legality of the warrant, and asked the court to instruct the jury that it did not authorise the constable and his assistants to break the door of plaintiff's house, if *Kilbourn* was not then in the house. This instruction we think ought to have been given. The court in their subsequent instructions, make this question to depend upon the nature of the plaintiff's possession.

The defendants justified upon two grounds, one the right of possession, derived under the deed and agreement between *Grafton* and the plaintiff,—the other, the authority to enter upon the premises, and arrest *Kilbourn* under the warrant. The plaintiff in this prayer appears to have sought from the court an opinion as to the authority of the constable to break the door of the house occupied at the time by the plaintiff as her dwelling, in his pursuit of *Kilbourn*, against whom the warrant was directed. The constable in execution of a warrant to arrest a party, breaks another's house at his peril. If it shall prove that the party is not in the house, the officer is a trespasser. If Mrs. *Hall* was

Elizabeth Ann Hall vs. Hall, *et al.*—1834.

actually occupying the house at the time with her family, it was to this purpose her castle, and whatever controverted rights of possession there might be in relation to it, the officer derived no justification from that circumstance. We think the court should have so instructed the jury, as not to make the authority of the constable, under the warrant, dependent upon the collateral fact of possession.

The *fifth* point made by the plaintiff was, that before the defendants could be justified in breaking the door in executing the warrant, the constable should have demanded entrance. We think this instruction should have been given as prayed, and we do not concur in the qualification afterwards given by the court, which excused the demand, if *Mrs. Hall* knew the purpose for which they came.

The *sixth* point relates also to the manner of executing the warrant.

Although the prayer does not distinctly assume as a preliminary hypothesis, that the jury should believe the plaintiff to have been in possession, yet as the whole evidence is referred to in the introductory part of the exception, and there does not appear to have been any conflict in the testimony upon that fact, we feel bound to consider it as implied. The court in their instructions upon this subject, have united its consideration with various other matters. It is clear that a legal warrant would not have authorized the officer charged with its execution to commit the acts enumerated in the prayer, and we think the court should distinctly have said so to the jury, and that if *Kilbourn* was not in the house, the breaking open the door was not justified, although it may have been done with as little mischief or inconvenience as possible to the plaintiff.

The *seventh* instruction prayed for was that the deed of trust conferred no right on *Grafton*, or any one acting under his authority, to dispossess the plaintiff of the trust property, if the jury believed the plaintiff was in possession either by the agreement of *Grafton*, or by his permission, &c.

We have before expressed the opinion, that under the circumstances of this case the plaintiff had an absolute interest in one undivided fifth part of the premises, and was tenant from year to year, of the residue, and that *Grafton* had no authority in person, or by agent, to enter and dispossess the plaintiff at pleasure.

We cannot therefore concur in the modification of this prayer made by the court. It follows in like manner, from what has been said, that the *eighth* instruction should have been given, as prayed, without the modification.

The *ninth* instruction moved for by plaintiff relates to the re-entry of *Hall* the defendant, after a previous entry, which is assumed to have been lawful.

In the view taken by this court, no such legal effect would ensue from the first entry of *Hall*, the defendant, as to dispossess the plaintiff.

If *Hall*, the defendant, did take possession in fact adversely to the possession of the plaintiff, and in her absence, he was a trespasser; and if the plaintiff afterwards returned to the premises, and finding them unoccupied by *Hall*, quietly repossessed herself of them, the defendant, *Hall*, could derive no sanction for a second entry, from the fact of his having previously entered. If the entries were made for the purpose of disturbing the plaintiff's enjoyment of the property, or in a violent manner, or for any other purpose than to discharge the right of supervision reserved by *Grafton's* contract, it was not in pursuance of any authority given either by the deed or the agreement. We do not concur, therefore, in the modification of the court to the *ninth* prayer. The *tenth* point has been abandoned by the appellant's counsel.

The *eleventh* prayer asked the court to say, that if the jury believed the warrant to have been received and served by *Sharer*, and returned by the magistrate, and that *Kilbourn* had been produced before the magistrate who had "taken his recognizance, then the warrant was *functus officio*, and could not again be re-issued."

Elizabeth Ann Hall *vs.* Hall, *et al.*—1834.

The law anxiously regards the security of a ministerial officer in serving process directed to him by a competent jurisdiction. It may well happen that a magistrate issuing a warrant may act illegally and subject himself to an action or to a prosecution, while the constable executing the warrant illegally issued, will be justified. The evidence is contradictory, in regard to the return day in the warrant in this case. The magistrate swears there was no day of the month named in it as the return day, but that it was returnable forthwith. If a warrant be issued by a magistrate and delivered to a constable who executes and returns it, and produces the body of the party who is recognized or discharged, and before the return day the magistrate directs the same warrant to another constable, who without knowledge of the previous arrest, again arrests the party, we think he would be justified, although the magistrate's conduct would be illegal. The plaintiff, in stating the case upon which the prayer is founded, does not enumerate the circumstances under which the warrant was re-issued, except only that it had been previously issued, and served by another constable, and that the party had been taken and recognized. These particular facts might exist, and yet other circumstances might also exist, which would justify the second officer who executed the warrant, and we think the motion was properly refused. The *twelfth* instruction was asked upon the ground that parol evidence could not be given of the warrant. It was traced to the hands of the magistrate who proved its loss, and we can discover no ground of distinction between this case, and the every day case of a lost paper, and therefore concur in the opinion which rejected this application.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

Rigden *vs.* Wolcott.—Same *vs.* Wolcott.—1834.

JOHN E. RIGDEN *vs.* CHARLES WOLCOTT.—Dec. 1834.
Same *vs.* WILLIAM WOLCOTT. “

It is a general rule, that under the plea of *non cul*, in an action for defamatory words, the defendant may give evidence of such facts and circumstances, as show a ground of suspicion of the truth of the matters charged, not amounting to justification, or proof of guilt of the plaintiff, in *mitigation of damages*, but not in bar of the action.

Words, when used in a manner and sense to impute guilt, imply in contemplation of law, malice sufficient to sustain an action, and entitle the plaintiff to a verdict; but the amount of damages depends in part on the degree of malice, of the malignity and wantonness of intention to injure, with which the words used were spoken.

It is not necessary in an action of slander for the defendant to give notice of his intention to offer evidence in mitigation of damages under the general issue.

APPEAL from *Baltimore* county court.

Actions on the case for slanderous words, spoken by the appellant of the appellees, instituted on the 8th of June, 1830.

Issues were joined upon the pleas of not guilty.

The circumstances of these cases are sufficiently stated by the judge who delivered the opinion of this court.

The appeals were taken by the defendant, the verdict and judgment of the county court (HANSON, A. J. presiding) being in favour of the plaintiffs in that court.

The causes were argued before BUCHANAN, Ch. J. and STEPHEN and CHAMBERS, J's.

***McMahon* for the appellant.**

The question is, whether in an action of slander, evidence in mitigation of damages, can be received upon the plea of not guilty.

Upon this issue, the question is, not whether the words are true or false, but whether they were spoken; and if spoken, with what degree of malice; malice constituting the gist of the action; which is, in its nature, both remedial and penal; remedial for the redress of the injury done

 Rigden vs. Wolcott.—Same vs. Wolcott.—1834.

to the plaintiff, and penal, for the punishment of the defendant, for his malignity, and therefore the *quo animo*. is a most material inquiry. 4 *Wen.* 139. 7 *Cowen*, 624, 627.

It is competent to the plaintiff to enhance the malice, and aggravate the damages, by proof that the words were frequently spoken, and upon occasions, and under circumstances calculated to do the plaintiff the greatest possible injury, or by proof of the speaking of other slanderous words. 1 *Campb.* 49. This is tolerated to inflame the malice, and consequently to swell the damages, and justice therefore requires, that the defendant should be allowed to mitigate both, by the proof of circumstances, showing that instead of being actuated by malice, he was influenced in speaking the words imputed to him, by a conviction of their truth. Malice is a presumption of fact, resulting from the falsehood of the words, and may be repelled by proof of circumstances, indicating its non-existence. It is not a legal presumption, incapable of contradiction. In civil cases the jury are not only to find the malice, but the *quantum* of the malice, which would not be the case if it was a legal rule, for then the same amount of damages must be recovered in every case. It is not possible that the same amount of damages can be awarded against the party who wantonly, and causelessly assails the character of another; and him who utters the same words, under a full conviction of truth, and under circumstances of strong suspicion.

To show that suspicious circumstances may be proved, he cited,—3 *Campb.* 294. *Rand. Peake*, 349, appendix 94. 3 *Serg. and Lowb.* 111, 113, 115. 12 *Ib.* 268. 22 *Ib.* 357. 2 *Campb.* 254. 14 *Serg. and Lowb.* 248. 1 *Binny*, 90, note (a.) 7 *Cowen*, 613. 4 *Wen.* 114. 7 *Ib.* 632. 3 *Massa. Rep.* 553. 1 *Pick.* 7. 2 *Pick.* 310. 3 *Con. Rep.* 463, 466. 4 *Con. Rep.* 408, 416. 1 *Nott and McCord*, 268, 271, 274. 3 *Ohio Rep.* 270. 4 *Gill and Johns.* 342.

Rigden vs. Wolcott.—Same vs. Wolcott.—1834.

The second case differs from the first, only in the fact, that notice of the defendant's intention to offer the mitigating proof was not previously given to the plaintiff, and that the defendant's proof was rejected in advance, and not first offered; and then upon the prayer of the plaintiff's counsel, decided by the court to be inadmissible for the purpose for which it was offered.

He insisted, that notice to the plaintiff of the proposed proof, was not necessary, because the object of it was not to inculcate him, but to exculpate the defendant from the imputation of malice. But if it was otherwise, and the proof referred to is calculated to throw suspicion upon the plaintiff, it would be admissible, as a man of suspicious character is not entitled to the same damages, as one whose character is free from stain.

The question to be solved is the malice of the defendant, and proof to that point, on either side, should not be excluded. 3 *Gill and Johns*. 386. 19 *Serg. and Lowb*. 64.

Mitigating proof cannot be offered when the defendant pleads a justification; but if he retracts the justification, by an admission upon the record, of the plaintiff's innocence of the charge conveyed by the words, then such proof is admissible. 1 *Pick*. 19.

Hinkley for the appellee.

The action is for words imputing a felony, and their falsehood being admitted, the question is, whether proof of suspicious circumstances is admissible in mitigation of damages, as showing the absence of malice in the defendant.

The words are actionable in themselves, and malice is inferrible from their falsehood. *Stark. on Sland*. 127.

The action is given to make reparation to the plaintiff, for the *effect*, which the words spoken are calculated to have upon his reputation, and it would be as reasonable to admit evidence in reference to the *effect* of the words, as to the malice with which they were uttered. The law *implies*

the malice, where the words are actionable *per se*, and are proved, or admitted to be false.

If in such a case the malice can be mitigated, the action is destroyed. Evidence in mitigation of implied malice is inadmissible. 1 *Pick. Rep.* 2, 17. The plaintiff did not offer evidence to inflame the malice, by proof of extrinsic circumstances, or of words not charged in the declaration, but if he had done so, the proof offered on the other side would be inadmissible. 1 *Campb.* 49, note. 2 *Phillips' Ev.* 107.

It is the wrong done to the plaintiff which is to be repaired, in damages, which are not regulated by the defendant's malice; and whether he believes or disbelieves the words he utters, is immaterial, as that cannot affect the injury sustained by the plaintiff. *Stark. on Slander*, 404, 411.

If the malice with which the words are spoken is the material circumstance to guide the jury in the assessing of the damages, then slander in an unknown language would be actionable, as there may be as much malice in the uttering of such language, as in a language known to the bystanders, by which alone the party slandered can be injured. *Stark. on Slander*, 35, 265, 266. 2 *Stark. Ev.* 844.

Under the general issue, facts and circumstances, not amounting to a justification, cannot be given in evidence in mitigation of damages. 3 *Serg. and Lowb.* 177. 16 *Ib.* 412.

BUCHANAN, Ch. J., delivered the opinion of the court.

This was an action of slander, in which issue was joined on the plea of not guilty.

At the trial below, the speaking of the words charged in the declaration being proved, the defendant offered evidence in *mitigation of damages*, of probable cause of suspicion at the time of speaking the words complained of, not amounting to proof of their truth; accompanied by a disclaimer of any intention to prove the commission by the

Rigden vs. Wolcott.—Same vs. Wolcott.—1834.

plaintiff of the crime imputed to him; and by notice to the plaintiff given some time before the trial of the proof intended to be offered, and the evidence itself that was offered, going to exculpate the plaintiff from the charge, but showing a ground of suspicion of his guilt, at the time the words were uttered—which was rejected by the court as inadmissible, for the purpose for which it was offered.

The authorities upon this subject are very numerous, with some apparent inconsistency; but if examined, they will be found, it is apprehended, to differ not so much as to the principle involved, as in relation to the peculiar nature of the particular case, and the character of the evidence offered—not as to the *principle* itself, but the application of it.

The general rule, as we conceive, being that under the plea of *non cul.*; in an action for defamatory words, the defendant may give evidence of such facts and circumstances as show a ground of suspicion, not amounting to justification, or proof of guilt of the plaintiff, in mitigation of damages, but not in bar of the action. The words themselves, when used in a manner and sense to impute guilt, implying in contemplation of law, malice sufficient to sustain the suit, and entitle the plaintiff to a verdict, but the amount of damages depending on the degree of malice, of the malignity and wantonness of intention to injure, with which they were spoken.

Hence the discretion vested in the jury, to assess nominal or aggravated damages, according to the circumstances of the particular case, as a compensation to the plaintiff for a wound inflicted upon his feelings and character; and a punishment of the defendant for the wanton indulgence of his malignant propensities.

And hence, too, the practice and right of the plaintiff to give evidence of the express malice, and settled purpose of the defendant in the use of the words charged, to injure him in his character and standing in society.

Rigden *vs.* Wolcott.—Same *vs.* Wolcott.—1834.

If it was otherwise, and every case for words actionable *per se*, was made to depend upon the malice which the law implies, and of which the law knows no degrees, juries would have no criterion by which to measure the amount of their verdicts, and no grounds furnished them for giving exemplary damages, either as a compensation to the plaintiff, or a punishment of the defendant. And surely, he who impeaches the integrity of another, under an honest conviction of the truth of what he says, arising from probable grounds of suspicion, known to him at the time of speaking the words, is a less fit subject of aggravated damages, than one who goes through the country uttering malicious slanders, with the settled malignant purpose of destroying his neighbour's character, knowing, at the time, that what he says is false.

The malice which the law implies, is of itself sufficient to support the action; but the damages to be commensurate with the offence, should be regulated by the *quo animo*, with which the words were spoken, for which the suit is brought. And for the very reason for which the plaintiff is permitted to give evidence of a degree of malice, beyond that which the law implies, in order to aggravate the damages, should the defendant be allowed to give evidence in mitigation, by showing that he uttered the words imputed to him upon probable grounds of suspicion of the plaintiff's guilt, calculated at the time, to impress the belief of their truth; and that they were not spoken, for the fiend-like purpose of falsely and wantonly destroying his character.

Though he cannot, under the plea of not guilty, be suffered to prove the truth of the words, or give evidence amounting to a justification; as that would be to subject the plaintiff to surprize, who looking to the defence placed by the plea upon the record, and not knowing the course intended to be pursued by the defendant at the trial, can only be expected to come prepared to prove the speaking of the words, and not to disprove their truth. If, there-

fore, the defendant has matter of justification, on which he means to rely, he should by his plea give notice to the plaintiff of that defence, in order that he may be prepared to meet it. But to deny to the defendant the right to show, in mitigation of damages only, on the plea of not guilty, the probable grounds of suspicion, on which he spoke the words complained of, and thus to explain his conduct, when he may subsequently to the time of speaking them have seen reason to change his opinion, would be to drive him, whether he will or not, and contrary to his own conviction at the time of pleading, to put in the plea of justification—which, if he fails to sustain, must often have the effect to increase the damages by furnishing proof on record of continued malice, though none, in fact, may continue to exist. And to force him to the alternative of hazarding such a plea, and to the proof in support of it, when he may not wish to offer it, but only desirous to vindicate himself, by explaining the ground on which he acted; or of submitting to the imputation of malignity, and wanton and intentional falsehood and defamation, would be to inflict upon him a hardship which the law is studious to avoid; to cast an odium on the system of pleading, intended for the furtherance of justice, and to place a man, who speaks only what at the time he believes to be truth, upon a level with the malicious slanderer. We do not, therefore, concur in opinion with the county court, and the judgment must be reversed.

The case of the same appellant *vs. William Wolcott* differs from that just decided only in this; that in the former case, notice appears to have been given some time before the trial to the plaintiff, of the intention of the defendant to offer in mitigation of damages the evidence proposed; which we think of no consequence, and was not necessary to have been given. And also that in this case, the defendant's counsel was stopt *in limine* by the court, and not permitted to give any evidence of probable cause of suspicion at the time of speaking the words charged, in

Guyer *vs.* Maynard, Executor of Neth.—1834.

mitigation of damages, in which we think the court erred, and should have suffered evidence not amounting to a justification to go to the jury, on the general issue in mitigation of damages ; but not in bar of the action.

THE JUDGMENTS IN BOTH CASES ARE REVERSED, AND
PROCEDENDO AWARDED.

JOHN GUYER *vs.* MAYNARD, Ex'r of NETH.—*Dec.* 1834.

By the will of W, the remainder of his real estate was devised to a residuary legatee, and his executors were directed to sell such parts of his real and personal estate as they might think proper and necessary, for the payment of debts and legacies. Under this will the executors possess only a naked power to sell, and until the exercise of that power, the estate passed in fee simple to the devisee, who *only* was authorized to receive the rents and profits. An order of the court of Chancery to sell the real property founded upon an allegation of the inadequacy of the personal estate to pay debts and legacies, without any reference to the rents and profits of the property ordered to be sold as necessary to pay debts or legacies, *held* not to affect the devisee's right to them.

APPEAL from Chancery.

On the 3d of January, 1816, *James Williams, the elder*, made and published his last will and testament, in which, after directing that his debts should be paid, and giving several legacies,—there are the following clauses :—

“I give and bequeath to my nephew, *James Williams, of Philadelphia*, all the remainder and residue of my estate, both real and personal, of every kind and description, that I may die possessed of, or that I may be in any way entitled to, in law or equity.”

“My executors will sell such part, or parts of my real and personal property, as they may think proper and necessary, to enable them to pay off the legacies as soon as convenient ; and all the legacies that are not paid within eighteen months after my decease, are to be paid with interest from that time.”

Guyer vs. Maynard, Executor of Neth.—1834.

The said *James Williams*, the residuary devisee, and legatee, the appellant, and *Lewis Neth*, the testator of the appellee, were appointed executors of the will.

After the death of the testator, which occurred in April, 1818, letters testamentary on his estate were granted to *Williams* and *Neth*, *Guyer* (the appellant) the other party named having declined; and upon their petition filed on the 20th of September, 1825, setting forth the inadequacy of the personal estate to pay the debts and legacies of the testator, the Chancellor on that day, passed an order appointing *Neth* one of the executors, a trustee to make sale of the real estate, as directed by the testator's will.

He made sale, accordingly, of various portions of the same, and his sales were duly reported to, and ratified and confirmed by the court.

After settling several accounts in the Orphan's court, in conjunction with his co-executor, *Williams*, and as surviving executor after his death; by which the personal estate appeared to be considerably overpaid; he himself died, leaving the appellee, *Samuel Maynard*, his executor, who on the 12th of December, 1832, filed a petition in the cause, setting forth the above facts, and stating further, that from the date of the letters testamentary to *Williams* the younger and *Neth*, to the periods of selling the real estate of their testator, they had received the rents and profits of said real estate, and had paid large sums for repairs, taxes and other charges, for which the petitioner proposed to render an account to the court of Chancery.

The Chancellor, on the same day, passed an order referring the case to the auditor, with directions to state an account as prayed, subject to exceptions, to be filed within three months after the date of the auditor's report.

The auditor accordingly stated and reported several accounts, to which a number of exceptions were filed by the appellant, *Guyer*, as a creditor and legatee under the will of *Williams*; but as all the points of controversy growing out of them were compromised, except one, before

Guyer *vs.* Maynard, Executor of Neth.—1834.

the decision of the case of this court, it is only necessary to advert to that one. It charged error in the auditor's accounts, in making the balance of the rents and profits of the real estate, payable to the residuary legatee, (*Williams*) to the exclusion of creditors. *Bland*, Chancellor, on the 4th of June, 1833, confirmed the account in this respect, and the appellant, thereupon, appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and STEPHEN DORSEY and CHAMBERS, Judges.

Pinkney for the appellant.

The balance due for the rents and profits of the real estate received by *Neth*, was assets in his hands, and chargeable to him as such. 4 *Bac. Abr.* 281. 2 *Pr. Wms.* 309. 2 *Burr. Rep.* 10, 27.

But if the whole amount thus received was not assets, at all events, what was received after the decree of September, 1825, directing a sale of the real estate, was—for after that decree, the rights of the devisee were divested, and if *Neth*, the trustee, was unable to effect a sale, he should have rented the property for the benefit of the creditors and legatees.

Johnson and *Alexander* for the appellee.

The rents and profits of the real estate received from the death of the elder *Williams*, until its sale, were clearly the right of the residuary devisee. No estate whatever, vested in the executors under the will, who were clothed simply with the naked authority to sell, and consequently, until sold, the title devolved on the residuary devisee, accompanied with the incidental right to the rents and profits. *Coke Lt.* 113. (a) 1 *Caine's Cases*, 16. 4 *H. and McH.* 73. 1 *Bro. Ch. R.* 311. 2 *Saund. Rep.* 337, note 8. 1 *Mad. Ch. Pr.* 596.

Land directed to be sold for a special purpose, is not converted into personal estate, and the rents and profits which

accrue in the interim belong to the heir. 1 *Mad. Ch. Pr.* 598. The argument upon the other points is omitted.

DORSEY, J. delivered the opinion of the court.

By the agreement of the parties, recently filed in this court, all the various questions which have been discussed, are withdrawn from our consideration, except that which seeks a reversal of the Chancellor's order appealed from, on the ground that the appellee is not made to account for the balance of rents and profits accruing from the real estate of *James Williams*, the testator, and received after his death by his executor, *Neth*.

In the will of *James Williams*, his real estate is not devised to his executors, to be by them sold; but is given to his residuary devisee, his nephew, with a power to his executors to sell such parts as they might think proper and necessary, for the payment of debts and legacies. The executors possess only a naked power to sell; until the exercise of which, the estate passes in fee simple to the devisee; who, only under the will, is authorized to receive the rents and profits thereof. Should they have been collected by his executor, *Neth*, his receipt of them is without authority, and he must account to the devisee, or his representatives. And there is no difference in this respect, between rents received before, and after the chancellor's decree of September, 1825. The only office of that decree, as far as the delegation of power was concerned, being to clothe one executor with the authority invested by the testator in three.

In deciding the question submitted to us, we have based our opinion exclusively upon the facts, as presented by the record. Whether as an abstract question, upon a legatee's bill, properly framed, with the necessary averment of the insufficiency of the real and personal assets, exclusive of these rents to pay debts and legacies, the appellee could be made to account for them, we have formed, and mean to

Lyde Griffith *vs.* The Frederick County Bank, *et. al.*—1834.

express no opinion; nor how far, in the event of his being so accountable, that accountability is discharged, by the alleged amounts due him from *James Williams*, the devisee.

THE ORDER OF THE CHANCELLOR AFFIRMED, BUT
WITHOUT COSTS IN EITHER COURT.

LYDE GRIFFITH *vs.* THE FREDERICK COUNTY BANK, *et al.*
December, 1834.

A deed executed to indemnify endorsers, who became such for the grantor at his request, is founded upon a good consideration, and vests his interest and estate in, and title to, the property conveyed, in the grantees, until it has performed its office of indemnifying them from responsibility; it cannot be impeached at the instance of a creditor, whose pretensions can only be considered equally meritorious.

Indemnity is a good consideration within the Statute of Frauds; and the Statute of Elizabeth does not extend to conveyances made upon good consideration and *bona fide*.

When contracts are rescinded, the parties must be restored to their former rights, and placed in the same situation in which they stood anterior to the contract.

Whenever a court of Equity is prevailed upon to set aside an agreement, it will be on refunding what has been *bona fide* paid, and making allowances for improvements.

A creditor at large before judgment, and before he has a certain claim upon the property of his debtor, has not a right to call for a specific execution of his debtor's contracts, for the creditor's benefit. Neither can the creditor, in such case, ask for a rescinding of the contract.

The court of Chancery, in decreeing a specific execution of agreements, exercises a discretion regulated by fixed and established rules.

In a contract for the sale of lands, when the parties stipulated that "in case they could not agree on the price, we do agree to leave the same to two disinterested men to fix between us," and the price was to be paid in the year following, and the parties had not fixed the price either by themselves or by arbitrators appointed for that purpose, a court of Equity will not decree a specific performance. Whether such a contract is valid under the Statute of Frauds, *Quere*.

To vacate a decree obtained against a man of intemperate habits, there must be evidence that advantage was taken of his indiscretion, or that he was improperly practised upon in obtaining the decree.

A creditor whose rights are ascertained by judgment, as against real property, and by judgment and execution, as against personal property, may proceed

Lyde Griffith vs. The Frederick County Bank, *et al.*—1834.

in Equity to redeem outstanding mortgages against either, for the purpose of applying any surplus to the payment of his debt, and be entitled to a preference according to his legal priority.

The case of *Birely vs. Staley*, 5 G. and J. 432, confirmed.

A creditor can only call upon a court of Equity to sell the real estate of his deceased debtor, under the Act of 1785, *ch.* 72, upon the ground of the insufficiency of the personal estate to pay his debts. The jurisdiction of the court depends upon the condition therein mentioned. Such insufficiency ought to be alleged in the pleading, and established by the proof.

Under the Act of 1795, *ch.* 88, the Chancellor is authorised to decree a sale of equitable titles or claims to land for the payment of debts, but that jurisdiction is exercised upon the terms prescribed by the Act of 1785, *ch.* 72.

Where the court of Chancery dismisses a bill absolutely, which ought to be dismissed without prejudice to future proceedings by the complainants, that error is corrected by reversing the decree appealed from, and passing a new decree; and in this case, the appellant was decreed to pay costs in both courts.

APPEAL from the court of Chancery.

This bill was filed by the appellant against the appellees, on the 22d of October, 1829, and *Bland*, Chancellor, having dismissed it with costs, he appealed to the court of Appeals. The pleadings are stated by the judge, who delivered the opinion of this court, as follows:

The complainant charges in his bill, that *John* and *Ephraim Etchison*, the last of whom had departed this life, become indebted to him in a certain sum of money, and that *Ephraim*, in his life-time, and at the time of his death, was seized and possessed of real and personal estate, of great value; part of which was held by him in severalty, and other part in common with the said *John*. That *Ephraim*, at his death, left certain legal representatives, whom he names, and who he charges are entitled to the surplus of his personal estate. He charges that he is entitled to an amount of the aforesaid property, and that the same ought to be applied, under the direction of the court, to the payment of his claims, and other creditors of said *Ephraim*. He charges that said rights are in danger of being impaired, if not entirely destroyed, by the false and fraudulent proceedings therein after mentioned. The bill

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

then states, that a certain *Joshua Stewart*, *Charles D. Warfield*, and the *President and Directors of the Frederick County Bank*, filed their bill of complaint against the said *John Etchison*, wherein they charged, that *John* and *Ephraim Etchison* in his life-time, conveyed certain real and personal estate unto said *Joshua* and *Charles*, in trust, to secure the payment of a certain note drawn by the said *Ephraim* and *John*, and endorsed by said *Joshua* and *Charles*, and discounted by said bank, for the sum of four thousand dollars, and that default had been made in payment of said note, and in consequence thereof, prayed a sale of said trust property, to be decreed by the court. That said bill was answered by *John Etchison*, the sole defendant. That a decree was accordingly passed, and that said *Stewart* and *Warfield* were appointed trustees to make the sale. That the trustees sold the personal estate, and had advertized the real estate to be sold. The bill then charges, that said proceedings are fraudulent and irregular, and have been prosecuted by the complainants, with a single eye to their own advantage, and with an utter disregard to the interest of the other creditors of said *Ephraim* and *John*; on behalf of whom, as well as for himself, he makes the following objections to said decree and proceedings. In the first place, he charges, that said *John Etchison* is a very weak-minded man, and addicted to the intemperate use of spirituous liquors; that when sober, he is unable to manage his affairs with common discretion. The bill further charges, that complainants availed themselves of his unfortunate propensities, to obtain from him an answer and decree to which they were not in equity entitled. That the complainants in their bill alleged that the property conveyed in trust, was held by *John* and *Ephraim*, in a co-partnership capacity, with the fraudulent view of bringing *John* alone before the court, upon whom they could easily practice, and bind the rights of the representatives of *Ephraim*, without giving them an opportunity of making their defence. The bill denies the

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

alleged partnership, and refers to the deed of trust, whereby it avers it will appear, that at least part of the property thereby conveyed, was of the several estate of said *Ephraim*. The said proceedings are then objected to, because the heirs at law and personal representatives of *Ephraim* were not made parties thereto. The bill then charges, that part of the property conveyed in trust, to wit, the property called the "*Great Meadows*," was purchased by said *Ephraim* and *John*, of a certain *Mahlon Chandler* and *Joshua Pearce*, and *Hannah* his wife, for the price of nine thousand six hundred dollars, or thereabouts, the greater part whereof has been paid; but that the said *Ephraim* and *John* have never obtained a legal title to said land. It further charges, that *Chandler*, *Pearce* and wife, although they fraudulently persuaded said *Ephraim* and *John*, that they could give them a good title, yet in fact had no title to the said property in fee simple, and that in case of a failure of title of said vendors, the payment of the balance of the purchase money could not be enforced, but that on the other hand, the said *John*, and the proper representatives of the said *Ephraim*, could compel the said vendors to refund the monies which have been already paid on account of said land; but that if the said decree should remain in force, and that if the trustees should be permitted to proceed with the sale of the real estate, the right of the vendees to rescind the contract, and recover back the money already paid, will be entirely destroyed, and that it would be doubtful, whether a purchaser under said trustees could avail himself of the defect of title of the vendors, as a defence against their claim for the balance of the purchase money, contracted to be paid by the said *John* and *Ephraim*, and that an execution of the decree would operate as a premium and encouragement to fraud; that it would afford to the said vendors a complete shield against every endeavour to deprive them of the fruits of their fraud and injustice, and will enable the complainants in that suit to perpetrate a fraud equally injurious to the other creditors of said *John* and *Ephraim*.

The bill then charges, that the proceedings are defective, inasmuch as the parties having, or pretending to have, the legal title, are not before the court, and because the extent of the lien of the vendors ought to be ascertained before the land is subjected to the operation of a new incumbrance. The bill further charges, that before the date of the said deed of trust, the said *Joshua* and *Charles* had endorsed a note for the said *Ephraim* and *John*, to the amount of two thousand dollars or thereabouts, which note was discounted by said bank ; that upon discounting the aforesaid note for four thousand dollars, part of the money received thereon, to wit. the sum of seventeen hundred and sixty dollars, or thereabouts, was applied to the payment of a balance due on the above note discounted for two thousand dollars, and the balance thereof was with the assent of the said *Charles*, received by the said *Joshua* in trust, to be applied to the discharge of certain debts, due and owing from said *John* and *Ephraim*, a large part of which sum, it is alleged, has been fraudulently converted by said *Joshua*, to his own use, which ought to be credited on said note last discounted. The bill then charges, that the said Bank cannot claim but as assignees of the said *Joshua* and *Charles*, and to the extent to which the said *Joshua* and *Charles* could themselves claim, in case said note was now held by them. The bill then charges, that the said *Joshua* and *Charles* have, by their fraudulent artifices, prevented the granting of letters of administration on the estate of said *Ephraim* ; at one time, persuading the said *John* to claim the personal estate as partnership property, and when this pretext failed them, they conspired together with a certain *Ephraim Gaither* (of *William*,) of *Montgomery* county, and under colour of a writ of execution, issued out of *Montgomery* county court, by said *Gaither*, seized upon all the personal estate of the said *Ephraim*, and sold the same to divers persons, at prices very far below its value. The bill charges, that said proceedings were fraudulent, irregular, and void, and that the said *Joshua*, *Charles*, and

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

Ephraim, as executors in their own wrong, are accountable for the reasonable value of said personal estate to the creditors of said *Ephraim*. The bill then charges, that some time in the year 1818, complainant agreed to purchase from said *Ephraim* and *John*, part of "*Great Meadows*," supposed to contain about the quantity of twenty-five or thirty acres, the price of which was to be settled by two disinterested persons, to be chosen by the parties, and that it was afterwards verbally agreed between the parties, that the complainant should allow a credit on his said claim for the amount of said purchase money, which purchase he is still willing and desirous to complete. The complainant states that he is willing that a survey be had under the authority of the court, to ascertain the exact quantity of land sold, and that arbitrators should be appointed to value said land, but that he is advised that he ought not to be compelled to execute said agreement, unless he can obtain a good title to said land, and that he cannot obtain a title except by the aid of this court, and with the concurrence of the said *Mahlon Chandler*, and *Joshua Pearce* and *Hannah* his wife. The complainant also charges, that the said *Joshua* and *Charles* had notice of his agreement before the date of said decree, and yet made no reservation of his rights therein; nor was he made party thereto. This is a full statement of the complainant's case, as detailed in his bill, and upon which he claimed the equitable interposition of the court below. After praying for a discovery, from the heirs of *Ephraim Etchison*, of all the estate, real and personal, he was seized or possessed of, or entitled to, at the time of his death, and that *John Etchison* might discover all property, real and personal, wherein he had an interest, jointly or in common with said *Ephraim*; and that said *Stewart* and *Warfield* might discover how much of the money obtained from said Bank was paid to said *Stewart*, and how the same has been applied by him; and that said *Stewart*, *Warfield* and *Gaither*, might discover by what authority, and under what pretences they seized upon and

Lyde Griffith vs. The Frederick County Bank, *et al.*—1834.

possessed themselves of the personal estate of the said *Ephraim*, deceased ; and might set forth a particular account thereof, and of the manner in which they had disposed of the same ; and that the said *Chandler*, *Pearce* and wife, might discover the particulars of their agreement with said *Joshua* and *Ephraim*, for the sale of said tract of land called "*Great Meadows*," and how much money has been paid on said agreement, and how much is now due on account thereof ; and might also set out their title to said lands. The bill then proceeds to make the following prayer, " that payment of your orator's aforesaid claim may be decreed according to the usages and practice of this court ; and that the said *Joshua Stewart*, and *Charles D. Warfield* and *Ephraim Gaither*, as executors in their own wrong, may be charged with the value of the aforesaid personal estate, so taken into their custody ; and that in case the said *Mahlon Chandler*, and *Joshua Pearce* and *Hannah*, his wife, have good title to the aforesaid land called "*Great Meadows*," a specific execution of said agreement and payment of the balance of the purchase money may be decreed to them ; and in case of a failure of title, then, that the aforesaid agreement may be rescinded ; and that the said *Mahlon Chandler*, *Joshua Pearce*, and *Hannah* his wife, may be decreed to bring into this court the monies so received by them, to be applied to the payment of the debts due from said *John*, and *Ephraim*, deceased ; and that all the real estate, wherein the said *Ephraim*, deceased, was interested in any manner, may be sold, and the proceeds distributed under the authority of this court ; and that the aforesaid decree may be reviewed and set aside ; and that your orator may have such other relief as his case may require. The contract of purchase stated in said bill, is in the following terms :

" An article of agreement made and entered into this 18th December, 1818, between *Ephraim* and *John Etchison* of the one part, and *Lyde Griffith* of the other part, witnesseth, That the aforesaid *John* and *Ephraim Etchison*

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

agree to and with the said *Lyde Griffith*, to sell him all the land lying south of the branch, running down by the beginning of "*Star's Fancy*," and in case we cannot agree on the price for the same, we do agree to leave the same to two disinterested men, to fix between us; we also suppose the quantity to be between twenty-five and thirty acres, for which payment the said *Lyde Griffith* agrees to make on or before the first day of July next."

The answer of the *President and Directors of the Frederick County Bank*, admits that they discounted the note of *John and Ephraim Etchison*, for four thousand dollars, which was endorsed by said *Stewart* and *Warfield*, and was then due and unpaid; and say, that they held the said drawers and endorsers responsible to them for the payment of the same. The said *President and Directors*, in their answer, also claim the benefit of the deed of trust executed by the said *Ephraim* and *John* to said *Stewart* and *Warfield*, as their endorsers for their indemnity, as security to them for the payment of said note.

The answer of *Warfield* and *Stewart* denies the frauds charged against them, and avers that they became endorsers on the said *Ephraim* and *John Etchison's* notes for their accommodation, and relying upon the security afforded by said deed of trust, for the payment of said notes. They state, that they obtained the decree to sell property to pay said notes. They deny the mental imbecility of *John Etchison*, and that any advantage was taken of him in obtaining his answer. They allege that if it be true as stated, that the said *Ephraim* and *John* have not obtained a good title to part of the property they conveyed to them, they have been imposed upon by said *Ephraim* and *John*, and have not all that security for the payment of the debt contracted at the Bank aforesaid, which the deed of trust professed to give them. They expressly aver, that they were induced to endorse said notes in consequence of the indemnity afforded them by said deed of trust, and deny generally, all the allegations of complainant's bill against them.

The answer of *Gaither* denies all fraud and combination charged against him, and states, that the property sold by him was to satisfy judgment obtained by him against the *Etchisons* in *Montgomery* county court.

The answer of *Chandler, Pearce* and wife, admits the contract of sale to the *Etchisons*, but denies all fraud in making the same. It states that they supposed they had good title to the land at the time the contract was made, and never understood till afterwards, that it was doubtful or questionable.

The answer of *John Etchison, Elijah P. Etchison*, and *Peregrine Etchison*, admits the claim of the complainant against said *John*, and *Ephraim*, deceased, as stated in his bill. That said *Ephraim* left considerable personal estate, but the same has been almost entirely wasted and destroyed by the proceedings of the defendants, *Stewart, Warfield* and *Gaither*, and by the sheriff of *Montgomery* county. They state, that besides the real estate mentioned in the deed to the defendants, *Stewart* and *Warfield*, there is other real estate in which the said *Ephraim* had an estate or interest, either several, or in common with said *John*. They admit the complainant's title to relief, and submit to such decree as may be just.

The answers of *James M. Etchison, Frederick Etchison, Jason Etchison, Osbourn Etchison*, and *Ruth Ann Etchison*, the infants by their guardian admit the claim of the complainant against the said *John* and *Ephraim Etchison*, as stated in his bill. They state that said *Ephraim* left considerable personal estate, but the same has been almost entirely wasted and destroyed by the proceedings of the defendants, *Stewart, Warfield* and *Gaither*, as is stated in complainant's bill, and by the sheriff of *Montgomery* county; that besides the real estate mentioned in the deed to the defendants, *Stewart* and *Warfield*, there is other real estate in which the said *Ephraim* had an estate or interest, either several, or in common with said *John Etchison*. The above is the substance of this case, as detailed in the bill and answers.

The appeal came on to be argued before BUCHANAN, Ch. J., and STEPHEN and ARCHER, Judges.

Alexander for the appellant, contended,

1. That the deceased *Ephraim Etchison* left real estate sufficient for the payment of the claims of his general creditors, and the decree should have provided for their payment by its sale. *Act of 1785, ch. 72, sec. 5.*

2. That the legal title to the tract of land called "*Great Meadows*," being supposed to be in the defendants, *Chandler* and *Pearce*, they were proper parties to this suit. The validity of their title, and the consequent validity and operation of the agreement between them, and *John Etchison*, and the deceased, were proper subjects for discussion in this suit, and ought to have been determined by the decree. Equitable interests in real estate may be sold by the *Act of 1795, ch. 88, sec. 2.*

The Chancellor could, and ought to have inquired into the title of these parties, and, consequently, one of the questions now to be decided is, what that title was. Whether it was good or not, depends upon whether the word "issue" in a deed, is a word of limitation, or of purchase; and that it is a word of purchase in a deed, is clear upon authority. *4 Harr. and Johns. 439. 4 Kent's Com. 222. 4 Term. Rep. 294. 2 Atk. 582.*

If the title of *Chandler* and others is defective, the contract between them and the *Etchisons* should be rescinded, and the purchase money already paid returned for the benefit of the creditors of the vendees; and the money so paid, being a lien on the land, it should be sold for the satisfaction of the claim. *Sugden's vendors, 385. 2 H. and G. 273.*

Magruder, Johnson, and R. J. Bowie, for the appellees.

The relief prayed against *Chandler* and *Pearce* is, that they should bring the money received by them into court, and this upon a bill not filed by the original vendees, the

Etchisons, but by him who claims as a general creditor, and a sub-purchaser of a part of the property.

Now, if this complainant has the same right to vacate the contract, as the original vendees, he should surely show a readiness to perform the contract on his part, by paying the balance of the purchase money. To entitle him to demand performance of the other party, he must show a readiness to perform himself. This is the rule at law, when damages are claimed; and a court of Equity will never interpose in behalf of a party who could not recover damages at law.

The *Act of 1795, ch. 88*, does not apply to a case like the present. That act only relates to equitable titles founded upon valid and subsisting contracts. When such a title exists it may be sold; but in a case like the present, when the contract is sought to be rescinded, upon the ground of a defect in the vendor's title, the act does not apply, because if the foundation of the application to the court is true, that is, that the vendor's title is defective, there is nothing to sell.

The vendees are in the possession of the land, and the court will not rescind the contract, without an offer to surrender the possession, which is not made. A defect in the title at the date of the contract is not a sufficient ground for setting it aside, provided it be perfect when the vendee is in a condition to call for a conveyance; and he can only do that, when he is prepared to perform it on his part by paying, or offering to pay the purchase money, which is not the case here. This court cannot say, but that the vendors, at the proper time, would have been prepared with a good title. With respect to so much of the bill as relates to *Ephraim Gaither*, his judgment at law against the *Etchisons*, and sale of property under the *fi fa.* for its satisfaction, it is sufficient to say that there is not a particle of proof in support of any of these charges; and the various frauds alleged against the bank, and *Stewart* and *Warfield*, are also all denied and disproved.

STEPHEN, J. delivered the opinion of the court.

The complainant in this cause seeks the aid of this court in two distinct characters;—as a creditor of *Ephraim* and *John Etchison*, and also as a purchaser of a part of the tract or pareel of land called the “*Great Meadows*.” In both these capacities, he seeks to affect property, which had been conveyed by his debtors, and which had been decreed to be sold for the purpose of satisfying the objects of such conveyance. His bill is a bill both for discovery and relief. In the first place, we think it clear beyond a shadow of doubt, that the complainant is entitled to no relief against *Stewart*, *Warfield*, and *Gaither*, whom he attempts to charge as executors in their own wrong of *Ephraim Etchison*. The allegations of his bill, as to any improper intermeddling by them with the personal estate of said *Etchison*, being wholly unsustained by proof. *Gaither* was a creditor of *Etchison* by judgment, regularly and legally obtained in *Montgomery* county court; to satisfy that judgment, he issued an execution, and placed it in the hands of the sheriff of the county, by whom the property of the defendant was sold to satisfy the debt due upon it. In the whole of this proceeding, there is not a *scintilla* of proof of any improper or illegal interference, by either *Warfield*, *Stewart*, or *Gaither*. The complainant in his bill then prays, “that in case the said *Mahlon Chandler*, and *Joshua Pearce*, and *Hannah* his wife, have good title to the aforesaid land called “*Great Meadows*,” a specific execution of said agreement, and payment of the balance of the purchase money may be decreed to them; and in case of a failure of title, then that the aforesaid agreement may be rescinded, and the said *Chandler*, *Pearce* and wife, may be decreed to bring into court the moneys received by them, to be applied to the payment of the debts due from said *John*, and *Ephraim*, deceased.” We think the court below were also correct, in refusing the relief so prayed, because the complainant, under the circumstances of the case, and according to the clearest principles of equity and justice, was not entitled to

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

it. On the sixteenth day of June, 1829, *John* and *Ephraim Etchison* being about to obtain a loan of four thousand dollars from the *Frederick County Bank*, solicited *Joshua Stewart* and *Charles D. Warfield* to become their endorsers, to enable them to effect said loan. To induce them to do so, they executed to them on that day a deed of indemnity, by which the tract of land called the "*Great Meadows*," together with other property, was conveyed with a power of sale in case the note endorsed by them and discounted by said bank should not be paid, when payment thereof should be demanded. This deed vested in *Stewart* and *Warfield* all the interest, estate and title of *Ephraim* and *John Etchison*, to the property thereby conveyed, until it had performed its office of indemnifying them against loss, in consequence of the responsibility incurred by them by reason of their said endorsement. It was a deed founded upon a good consideration, and could not be impeached, invalidated or set aside at the instance of a creditor, whose pretensions could only be considered equally meritorious. That such a deed is founded upon a good and valid consideration, see 2 *Johns*. 306, where *Chancellor Kent* says—"indemnity is a good consideration within the statute of frauds." See, also, to the same effect, 3 *Cranch*, 73, where the chief justice says,—“The deed is made to save *Hooe* harmless, on account of his having become the security of *Fitzgerald* to the *United States*, and on account of notes to be endorsed by *Hooe* for the accommodation of *Fitzgerald* in the *Bank of Alexandria*.” These are purposes for which it is supposed this deed of trust could not lawfully have been executed; and the deed has been pronounced fraudulent under the statute of 13th of *Elizabeth*. That statute contains a proviso, that it shall not extend to conveyances made upon good consideration and bona fide. The goodness of the consideration in the case at bar has been admitted. “This deed of indemnity being then founded upon a good and valuable consideration, it would have been repugnant to every principle of justice and equity, to

take from the grantees the security thereby afforded to them; and it is quite clear, that in no other way and upon no other terms, could the contract have been rescinded as prayed for by the complainant in his bill." In such cases the parties must be restored to their former rights, and placed in the same situation in which they stood anterior to the contract. Whenever a court of Equity is prevailed upon to set aside an agreement, it will be on refunding what has been *bona fide* paid, and making allowances for improvements. 2 *Powell on Con.* 143. It is true, the prayer of the bill does not absolutely ask for a rescinding of the contract, but is in the alternative, that in case *Chandler, Pearce* and wife, have good title to the said land, a specific execution of said agreement, and payment of the balance of the purchase money may be decreed to them. It is necessary to consider what was the capacity in which the complainant stood before the court in order to ascertain his right or title to call upon it to administer to him this relief. He states himself in his bill to be a creditor of the *Etchisons*, and a purchaser from them of a part of the land conveyed by them to *Warfield* and *Stewart*, called the "*Great Meadows*." As a creditor at large, and before judgment, and before he has a certain claim upon the property of his debtor, has he a right to call for a specific execution of the contract in his behalf? We think he has not. A leading case on this subject, and which is frequently referred to for the principle decided by it, and particularly by *Chancellor Kent*, in 2 *John. C. R.* 145, is to be found in 1 *Vernon*, 399—the case of *Angell vs. Draper*. In that case the bill stated, that the plaintiff had obtained judgment against I. S. for £100, and that the defendant upon pretence of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment, had got goods of I. S. of great value into his hands, sufficient to satisfy his debt with a great overplus, and prayed an account and discovery of these goods. The defendant demurred, because the plaintiff had not alleged that he had sued out execution, and had actually taken out *fieri*

Lyde Griffith vs. The Frederick County Bank, *et al.*—1834.

facias; for until he had so done the goods were not bound by the judgment, nor the plaintiff entitled to a discovery or account thereof. *Per. Cur.* Allow the demurrer. The plaintiff ought actually to have sued out execution before he had brought his bill. This case establishes the principle, that the creditor, until he has established a certain claim or lien upon his debtor's property, has no right to call for an account and discovery of such property, in the hands of a stranger or third person. If he has not, it is conceived that the same principle forbids his interference with the disposition of his debtor's property, and disables him from calling for a specific execution of the contract in this case, upon the ground merely that he is a creditor, and may ultimately have a claim upon it for the satisfaction of his debt. In 2 *Johns.* 144, 145, the same doctrine is sanctioned and established by *Chancellor Kent*, where he delivered the following opinion, which, as it is short, and strongly impressive of his views and sentiments upon the subject, we shall give at length; he says—"This is a case of a creditor on simple contract, after an action commenced at law and before judgment, seeking to control the disposition of the property of his debtor under judgments and executions upon the ground of fraud. My first impression was in favour of the plaintiffs; but upon examination of the cases I am satisfied, that a creditor at large, and before judgment and execution, cannot be entitled to the interference which has been granted in this case. In *Angell vs. Draper*, 1 *Vern.* 399, and *Shirely vs. Watts*, 3 *Atk.* 200, it was held that the creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in *Bennet vs. Musgrave*, 2 *Ves.* 51, and in the case before *Lord Nottingham*, cited in *Balch vs. Wastall*, 1 *P. Wms.* 445, the same doctrine was declared, and so it is understood by the elementary writers. *Mitford*, 115; *Cooper's Eq. Pl.* 149. The reason of the rule seems to be, that until the creditor has established his title, he has no

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

right to interfere; and it would lead to an unnecessary, and perhaps a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall accordingly grant the motion for dissolving the injunction." The object of the bill in this case was to obtain relief against judgments charged to have been voluntary, and without consideration; and also fraudulently confessed by the debtors with intent to defraud and injure the plaintiffs. The chancellor thought that a creditor at large was not entitled to the aid of a court of Equity, for the reasons stated in his opinion; and the reasons given for that opinion would seem equally to exclude the right of such a creditor to call for a rescinding or specific execution of a contract of his debtor for the purchase of land, simply upon the ground of the relation of debtor and creditor alone. But the complainant alleges that he contracted to purchase from the *Etchisons* a part of the land called the "*Great Meadows*," and many consider himself entitled to call for a specific execution of the contract upon that ground. In the first place, it is to be observed that this court, in decreeing a specific execution of agreements, exercises a discretion, not an arbitrary one, but a sound judicial discretion, regulated by fixed and established rules; and therefore says—2 *Powell on Con.* 221: "no rule is better established than that every agreement to merit the interposition of a court of Equity in its favour, must be fair, just, reasonable, *bona fide*, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary; consistent with the general policy of a well regulated society, and free from fraud, circumvention, or surprise; or at least such an agreement must, in its effect, ultimately tend to produce a just end." If any of these ingredients are wanting, or that object be not in view, courts of Equity will not decree a specific performance. A written agreement to be valid within the statute of frauds and perjuries,

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

must contain the terms of the contract, and particularly the price to be paid. 1 *Powell on Con.* 290, 291. Otherwise, says *Powell*, all the dangers of perjury which the statute was meant to provide against would be let in to ascertain the agreement;—so in 1 *John.* 279, *Chancellor Kent* says: “The memorandum appears to be utterly defective. It ought to have stated the terms of the contract, with reasonable certainty, so that the substance of it could be made to appear, and be understood from the writing itself, without having recourse to parol proof. This is the meaning of the statute, and without which, the beneficial ends of it would be entirely defeated.” So *Ib.* 280. He says: “the omission to mention the price in a letter acknowledging the contract to sell, was held by *Ld. Hardwicke* in *Clerk vs. Wright*, 1 *Atk.* 12, to be a fatal omission, rendering the written evidence of the contract too defective to take it out of the statute.” In the contract of the complainant, the price to be paid for the property purchased is not mentioned. As to that part of the contract, the parties stipulate in the following terms: “and in case we cannot agree on the price for the same, we do agree to leave the same to two disinterested men to fix between us.” This contract was made in 1818. By the terms of the contract the price was to be paid in the year following. No price for the property has ever yet been fixed, either by the parties themselves, or by arbitrators appointed for that purpose; so that if lapse of time would not prevent a decree for specific performance, the complainant does not present a case which would enable a court of Chancery to decree a performance in specie. The parties have reserved to themselves the right of fixing the price in the first instance; there is nothing to shew that any effort or attempt has been made to ascertain it; how then could a court of Equity decree a performance in specie in such a case, if applied to for such a purpose? It could only be done by assuming the power of fixing the price, a privilege which they have reserved to themselves by the express terms of their agreement. Whether such a

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

contract, leaving the price to future adjustment, would be good within the statute of frauds, we do not mean to determine. We are aware that where the price by the written agreement has been referred to arbitrators who have failed or refused to act, the court of Chancery has, under certain circumstances of hardship, assumed to itself the power of fixing the price which should be paid; but no adjudication has been found where the court has gone the length of administering relief, in the form of a specific performance, in a case in all respects analagous to the present. In *Jer. on Eq. Jur.* 442, we find the following principle stated,—“where upon a contract for the sale of property the price is not fixed, but is left to be determined by certain competent persons, this court will not force them to a decision, and will not undertake to perform the duty entrusted to them; so that if they do not fix thereon, the price being an essential part of the contract, the agreement must fail, unless under certain circumstances there has, notwithstanding the defect, been an acquiescence under it, or such a part performance that it would be inequitable not to enforce its execution. In such a case then, this court will ascertain what is the fair value.” If then the price to be paid by the complainant for the land which he agreed to purchase, has not been ascertained, either by the parties or by arbitrators, and no steps have been taken by the complainant to perfect the agreement in that particular, or reduce it to certainty, he is clearly, at present, not in a situation to call for the specific execution of that agreement, and consequently, had not a right to ask the assistance of the court to cause the agreement between *Chandler, Pearce* and wife, and the *Elchisons*, to be specifically performed, because he was a purchaser under them. If his contract is a good and valid one, his interest under it cannot be bound or affected by the decree in favour of *Stewart* and *Warfield*, because he was no party to such decree; and he may hereafter resort to Chancery for relief, if the nature and circumstances of his case should require it, and he can prove himself, in all

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

other respects, entitled to ask it; care should be taken to make proper and necessary parties to the suit, because “the court many times, upon hearing, will not, for want of them, proceed to a decree; or if it does, the decree may be reversed; or if it be not reversed, yet none but the parties to the suit and those claiming under them, are bound by it.” *Wyatt’s Chan.* 299. To the same effect is 1 *Sch. and Lef. Rep.* 386, where it is said, “a decree obtained without making parties, those whose rights are affected thereby, is fraudulent and void as to those parties.” The bill, for the purpose of vacating the decree, charges actual fraud in the obtaining of it; but we have perceived no proof to support that allegation. It appears, indeed, that *John Etchison*, the defendant, was a man of intemperate habits, but there is no evidence that advantage was taken of his indiscretion, or that he was improperly practised upon in obtaining the decree. The bill prays that a decree may be passed for the payment of the complainant’s claim. This could only be done by subjecting to the payment of it the property included and embraced in the deed of trust from the *Etchisons* to *Stewart* and *Warfield*; or by making liable therefor any other property which they might have, exclusive of that so conveyed. Had the complainant a right to call upon the court to decree a sale of the property embraced in the deed of trust for that purpose? We think that under the circumstances of the case he had not. The complainant in this case, if a creditor at all, (and whether he will ultimately be such, depends upon a contingency) was a creditor at large; he had, at the time of filing his bill, instituted no suit at law to recover his claim; he had issued no legal process for that purpose; but he has chosen to resort to Chancery in the first instance. Had he a right to do so?—we think he had not. The property embraced in the deed to *Stewart* and *Warfield* was conveyed to them for their indemnity. The deed executed for that purpose was founded upon a valuable consideration. The debtors of the complainants had no interest in the property, except

Lyde Griffith vs. The Frederick County Bank, *et al.*—1834.

an equitable interest, or resulting trust, at the time the bill was filed. The complainant had no right to subject that property to the payment of his debt, until the purposes of the deed of trust were fulfilled; and if he wished to make it responsible for the satisfaction of his claim, he should have filed his bill to redeem; which, as a creditor, he would have been entitled to do, after having previously taken the necessary legal steps to clothe himself with that power. To entitle himself to redeem the real and personal property conveyed by the deed, he should have obtained his judgment and issued his execution at law. In 4 *Johns. C. R.* 692, *Chancellor Kent* says,—“It may be laid down as a rule of equity, that an execution creditor at law has a right to come here and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate; and the party so redeeming, will be entitled in either case, to a preference, according to his legal priority.” So in 1 *Pow. on Mort.* 261, 262, it is said,—“The ground for redemption seems to be the having an interest in, or lien upon the land. He that has such interest or lien may redeem; he that has none cannot.” “But an equitable lien will entitle the encumbrancer to a redemption.” So *Ib.* 281, it is said “to entitle a creditor to redeem, his debt must be such as creates a lien on the land.” In 4 *John. Ch. R.* 622, it is said, that “a creditor, to entitle himself to the aid of this court in the recovery of his debt, must show that he has prosecuted his debtor at law, to judgment and execution, so as to have gained a legal lien and preference, at the time of filing the bill, or at least before issue joined in this court.” To obtain relief in equity, the principle seems to be well settled, that the creditor must first proceed at law to the extent necessary to give him a lien upon the particular fund sought to be affected. In 4 *Johns. Ch. R.* 677, *Chancellor Kent* says,—“That the rule has been long and uniformly established, that ‘to procure relief in equity by a bill brought to assist the execution of a judgment at law,

the creditor must show that he has proceeded at law to the extent necessary to give him a complete title.'” If he seeks aid as to real estate, he must show a judgment creating a lien upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a legal preference or lien upon the chattels. In referring to those decisions, and the principles therein contained, we wish it to be distinctly understood that they are relied on solely for the purpose of shewing that the complainant in this case had not such an interest in, or claim upon his debtor’s property, as to entitle him either to redeem that which had been conveyed by them as an indemnity, or to call for a specific execution of the contract of purchase made by them. We do not intend in the slightest degree to impugn or interfere with the principles contained in the case of *Birely vs. Staley*, 5 *Gill and Johns*, 432. If the complainant is not in a situation to ask the aid of the court in relation to the property embraced in the deed of trust, is he entitled to a decree for the sale of any real estate which might have descended to the heirs at law of *Ephraim Etchison*, and which was not embraced in said deed? The complainant, in his bill, “charges that the said *Ephraim Etchison*, in his life-time, and at the time of his death, was seized and possessed of, and entitled to real and personal estate in said county of great value; part whereof was held by him in severalty, and other part in common with the said *John*.” The bill further charges, “that the said *Joshua* and *Charles* have, by their fraudulent artifices, prevented the granting of letters of administration on the estate of the said *Ephraim*, deceased; at one time they persuaded the said *John Etchison* to claim the said personal estate as partnership property. And when this pretext failed them, they conspired together with a certain *Ephraim Gaither*, of *Montgomery* county, and under colour of a writ of execution, sued out of *Montgomery* county court, at the instance of the said *Ephraim Gaither*, seized upon all the aforesaid personal estate of the said *Ephraim*, deceased, and

Lyde Griffith vs. The Frederick County Bank, et al.—1834.

sold the same to divers persons, at prices very far below its value. Your orator is advised that said proceedings were fraudulent, irregular and void, and that the said *Joshua*, *Charles* and *Ephraim*, as executors in their own wrong, are accountable for the reasonable value of said personal estate to your orator, and the other creditors of said *Ephraim* deceased." The act of 1785, ch. 72, provides,—“That if any person hath died, or shall hereafter die, without leaving personal estate sufficient to discharge the debts by him or her due, and shall leave real estate which descends to a minor, &c.,” the Chancellor shall have full power and authority, upon application of any creditor of such deceased person, to order the whole, or part of the real estate to be sold for the payment of debts. In the construction of this act of assembly, this court have said in 4 *Gill and Johns*. 302,—“If personal assets come to the hands of the executor or administrator, sufficient to pay all the debts of the deceased, the creditor must look to that fund for the payment of his debts; and if those assets are wasted, his remedy is on the official bond of the executor or administrator. The real estate of the debtor is protected, unless the personal assets are insufficient; and to authorize the Chancellor to pass a decree to sell the real estate to pay the debts of the deceased, the bill must allege an insufficiency of personal assets for that purpose, and must sustain that allegation by proof, or the admission of the opposite party. We cannot, therefore, sustain this decree under the act of 1785, because the bill does not allege an insufficiency of personal assets to pay the debts; and if alleged, the complainants by their own showing, disprove the allegation.” The bill in this case does not charge that *Ephraim Elchison* died without leaving personal estate sufficient to discharge his debts; on the contrary, it says that—“at the time of his death, he was seized and possessed of, and entitled to real and personal estate in said county, of great value, part whereof was held by him in severalty, and other part in common with the said *John*. The personal estate, therefore, might have

Lyde Griffith vs. The Frederick County Bank, *et al.*—1834.

been sufficient for that purpose, if the proper steps had been taken. The Chancellor has no jurisdiction under the *act of 1785, ch. 72*, to decree a sale of the real estate except upon the condition therein mentioned ; and this court have said, that the exercise of such jurisdiction must be warranted both by the pleadings and the proof, or the decree cannot be sustained. Nor do we think that the claim of the complainant to the aid of the court, can be sustained by the *act of Assembly, 1795, ch. 88*, because that act provides that the Chancellor shall have power and authority “to decree the sale of any equitable title or claim to land *in any case* in which he might on application decree the sale of a legal complete title.” That act, therefore, only gives the Chancellor a right to decree a sale of the equitable estate on the same terms and conditions, as it invests him with power to decree a sale of the legal estate ; which, as we have already observed, is only where it is alleged and proved, that the personal estate left by the deceased was insufficient for the payment of his debts. But in this case, according to the complainant’s own showing in his bill, it may ultimately turn out, that he will have no rights as a creditor of the *Etchisons* ; on the contrary, it may be that he will finally become their debtor ; because it appears by the terms of this contract, as stated by himself, that the price of the land, when ascertained, is to be deducted from the debt due to him ; and as neither the price nor the quantity of the land have been ascertained, *non constat*, whether he will ultimately be a creditor to any amount, when the contract in these particulars shall be fully consummated ; for it may be that the price of the land purchased, when ascertained, will absorb the whole of his present demand, and thereby deprive him of any standing in court as a creditor. But the Chancellor erred in dismissing the complainant’s bill absolutely, when the dismissal should have been without prejudice, to any future proceeding he may think proper to institute.

Archibald Lee vs. George Peter.—1834.

The decree, for this reason, must be reversed, but the appellant will be decreed to pay the appellees the costs incurred by them in this court, and in the court of Chancery.

DECREE REVERSED ACCORDINGLY.

ARCHIBALD LEE vs. GEORGE PETER.—*December, 1834.*

The object of the 9th section of the act of 1797, ch. 87, was to give to the parties, plaintiff and defendant each, the privilege of striking from the list of *twenty* jurors, *four* of the jurors against whom no cause of challenge could be established.

To secure the full enjoyment of this privilege, the panel before it is stricken from, should present twenty names beyond the reach of challenge, either as a principal cause or to the favor, and the parties have the right to have their causes of challenge heard and determined upon before the panel is drawn from the ballot box.

APPEAL from *Montgomery* county court.

This was an action of *Slander*, instituted by the appellant against the appellee, on the 13th November, 1830. Issue was joined upon the plea of not guilty.

At the trial the following exceptions were taken by the parties.

1. This case being called for trial, and a panel of twenty jurors drawn from the ballot box, according to law, and presented to each party to strike from, according to the same law, and after the defendant had struck from the copy of the panel presented to him, and delivered back his copy of the panel so struck by him, to the clerk, and the clerk had delivered the same to the court, the plaintiff, before striking the name of any juror from the panel, offered to challenge for cause the polls of the said panel, that is, to shew cause of challenge for favor against the several individuals composing the said panel, and prayed the court to have such causes of challenge examined, and tried separately against

each poll challenged, according to the legal mode of trying and determining challenges against jurors for favour, and to have such challenges successively, so tried and determined before the striking of the said panel, so that if any such challenges be sustained, the said panel may be filled up by further draughts from the ballot box, or if that should be exhausted by successive challenges for cause, then from the *tales* until a panel of twenty competent jurors, free from challenge and cause of challenge for favor, be formed for the parties to strike from. But the court (KILGOUR and WILKINSON, A. J's) overruled such motion, and refused to allow any challenges for favor to the polls of the said panel, until the same should have been struck by the parties, and the twelve jurors called to the book to be sworn; the defendant offering and agreeing, that if such challenges should embrace every individual juror on the panel, to waive any objection to the allowance of such challenge; but objecting to the challenge against any individual juror or jurors, not embracing every individual on the panel. The plaintiff excepted.

2. In the further proceeding of the court, for the trial of this cause, and after the motion and decision of the court, as stated in the plaintiff's first preceding exception, the plaintiff, by his counsel, objected to *William Price*, one of the twenty persons drawn as aforesaid, as competent jurors, on the ground that he had a matter of fact depending for trial at this term in this court. And the court, (KILGOUR and WILKINSON, A. J's) sustained the said objection to the said juror, and directed the clerk to withdraw his name from the lists aforesaid, and to draw the names of another juror from the names remaining in the ballot box, and to deliver lists of the jurors so drawn as aforesaid, with the name of the juror now to be drawn, in lieu of that of the said *Price*, to the counsel of the plaintiff and defendant, that they might each strike four names therefrom, which was done accordingly. The defendant excepted.

3. After the plaintiffs and defendants' foregoing bills of exception had been reserved as aforesaid, the plaintiff further offered challenges to the favor against each and every individual juror on the said panel of twenty, before having struck any individual from said panel, and prayed that such challenges might be examined and tried, and determined according to law, before the striking of said panel, to which defendant objected, and the court sustained the objection, and refused to admit the said challenges or any of them, before the said panel should have been struck, and the twelve jurors, not struck for the same, called to be sworn.

The plaintiff excepted, and the verdict and judgment being for the defendant, the record was brought upon the appeal of the plaintiff before this court.

The cause was argued before BUCHANAN, Ch. J., and STEPHEN, ARCHER and DORSEY, Judges.

Magruder, for the appellant.

It is not alleged on the part of the plaintiff, that the law in express words requires that all challenges *pro causa*, shall be made before any of the jury are called into the jury box. The right of either party to make his objections to individual jurors, before he strikes, is contended for, and it seems very clear that the benefit designed to be secured to each party might be lost, if our construction of the law be not correct.

A party strikes four of the most objectionable to him on the panel, and then the other party strikes four, and challenges *pro causa* the rest, so that the twelve jurymen afterwards brought into the box, may each one of them be more objectionable than either of the four whom he struck from the panel. It is said, however, that after the striking on each side has taken place, if a juror is wanted, the practice is to draw again. This may be, and is not objected to, because found convenient; but this the act of assembly

does not direct or authorise, and in many instances may be found productive of great evil. It is taken for granted, that if, from any cause, the remaining twelve cannot be got into the box, the court, *if required by either party*, would direct the whole number (twenty) to be drawn again. But the act of assembly forbids the construction which the defendants counsel would give to it. Twenty persons are to be drawn from the panel of jurors and written upon two lists, and a list delivered to each party, and from his list each is to strike four, and the *remaining twelve persons* shall thereupon be immediately impanelled, and *sworn as the petit jury in such cause*. Such are the words of the act of 1797, *ch. 87, sec. 9*. How can the remaining twelve be in any case the petit jury to try the cause, if all objection to be made to them by either party, must be reserved until both parties strike? The benefit designed to be conferred by the law, is best secured to them by the construction for which we contend, and the course proposed to be pursued by the plaintiff in this cause, is the only one consistent with its letter.

Johnson for the appellee.

The second exception in the record was taken by the appellee, and as there was no appeal by him, is consequently not before the court.

The other two exceptions are believed substantially to raise the same question. It is this:—Whether under the *act of assembly of 1797, ch. 87, sec. 8*, a party has a right in the first instance, and before the twenty jurors are drawn, to challenge not the whole array, but each or any individual juror on the array for favour, so as to secure to himself a panel of twenty not liable to be challenged for favour.

It will be seen that the act of assembly, but for the proviso, which saves the pre-existing right of challenging the array or the polls, would, literally construed, have defeated altogether such right of challenge, and have left the parties only the right of striking from the list of twenty, as is pro-

vided by that law. The right to challenge, however, is expressly reserved, and the only inquiry is, at what time, and in what manner is that right to be exercised.

Before this law, and it would seem to be in the nature of things the proper course, a challenge of the poll was always made when the juror was about to be sworn, and was called for that purpose.

The act of assembly, in saving this right of challenge, is not to be supposed to have intended to change the time and manner in which it was always before exercised. On the contrary, the only proper inference would seem to be, that they intended to leave it, in all respects, exactly as they found it.

If this view is right, there is an end of the present case; for the court below gave the appellant the power of challenging the polls for favour to any extent he thought proper, as the jurors were brought to the book to be sworn.

Nor can it be well contended, that this mode of using the right to challenge, will operate practically to prevent the plaintiff from having the benefit of striking from a panel not subject to be challenged for favour.

If the whole panel of twenty are obnoxious to good cause of challenge, he can get rid of them, and in the same way of the entire panel of twenty-five. If they are not, he strikes those only whom he cannot get rid of by challenge, but who he may suppose to be in some respects objectionable.

If the twelve should not be made up from the first twenty, the practice is to draw again for double or thrice the number wanted, and to give the parties a right to strike again, whilst they also retain the privilege of challenging for favour. It is difficult to imagine a mode more certain to secure an impartial jury.

The counsel has not been able to find any decision upon the question, and supposes it to rest entirely on the construction of the act of assembly. If it be conceded, as he thinks it must be, that the right to challenge the polls for

favour, as it was in 1797, was not designed to be interfered with by the act of 1797, (giving for the first time the right to strike) *neither as to the time nor the manner in which it was to be granted*, he supposes it clear that the decision of the county court was correct.

DORSEY, J., delivered the opinion of the court.

The object of the 9th section of the act of assembly of 1797, *ch.* 87, was to give to the parties, plaintiff and defendant, each the privilege of striking from the list of twenty jurors, four of the jurors, against whom no cause of challenge could be established. In express terms, it saves to the parties the unimpaired enjoyment of the right of challenge. It is, consequently the duty of the court, when required so to do, to extend to suitors the full benefit of both these privileges. Such is manifestly the policy and intent of the act of 1797. Each party is authorised, without any cause of challenge, for reasons confined to his own bosom, to strike from the list of twenty jurors, the four persons whom he is least willing should sit in judgment upon his rights. To secure the full enjoyment of this valuable franchise, it is manifest that the panel, before it is stricken from, should present twenty names beyond the reach of challenge. Should a suitor be required to strike from twenty, against some of whom he believes he has ground of challenge, and is unwilling that they should sit as judges in his case, he has not the free and uncontrolled power of striking, which the legislature designed to grant him. If he conceives he has a principal cause of challenge, he cannot, perhaps, safely rely on his ability to prove it to the satisfaction of the court. If a challenge to the favor, it might be unsafe to speculate on what would be the opinion of the triers. To avoid all risks, therefore, he might be induced to strike off those whom he believes he has cause to challenge; or, if relying on the sufficiency of his contemplated challenges, he strikes from those to whom they are inapplicable, upon the challenges being adjudged insufficient he may leave

Doogan vs. Tyson, et al.—1834.

upon the jury, the four individuals whom, of the whole twenty, he would originally most anxiously have desired should be stricken off. And the reason for such desire, perhaps, may be doubled by the increased prejudice resulting from the causes assigned for challenge.

By the denial of the exercise of the right claimed by the appellant, at the time it was insisted on, the party, in effect, may be deprived of all the benefit in striking the jury, which it was the intention of the act of assembly to confer upon him. We think, therefore, that the county court erred in refusing to hear and determine the causes of challenge to the polls, made by the plaintiff below, until he had stricken the jury; and for that reason reverse their judgment.

JUDGMENT REVERSED AND PROCEEDENDO AWARDED.

THOMAS T. M. DOOGAN vs. JOHN S. TYSON, et al.—
December, 1834.

The object of the replevin bond is the indemnity of the defendant in replevin, and all questions arising upon it should be determined by a due regard to that consideration.

The plaintiff in a replevin bond binds himself to prosecute his suit with effect, and in case the property is adjudged to be restored to the defendant, he is bound to do so or his bond is forfeited. In consequence of the property being restored to him by virtue of the writ of replevin, he assumes upon himself by his bond this legal responsibility.

Whether the plea of general performance in an action upon a replevin bond be a correct plea or not, if incorrect, it can only be objected to upon demurrer.

The plea of general performance where correctly pleaded renders it necessary for the plaintiff to show his cause of action in his replication, and to state the breaches of the condition of the bond upon which he expected to rely.

In an action upon a replevin bond, the defendant pleaded general performance; the plaintiff replied, after setting out the proceedings in the replevin and the judgment for a return, that the defendant had not made a return of the said goods, or any of them, and did not prosecute his suit with effect. The defendant rejoined, that the goods, &c. mentioned in the replication were not replevied and delivered to him under the writ of replevin in the replication

Doogan vs. Tyson, et al.—1834.

mentioned, and that he did prosecute his suit with effect. To this rejoinder the plaintiff demurred specially—for duplicity—departure—and that the issue tendered by the rejoinder of the non-delivery of the goods under the writ of replevin was an immaterial one. HELD, that as the double response in the defendant's rejoinder was only an answer to the breaches assigned in the plaintiff's application, the objection for duplicity could not be sustained; but that the fact of the non-replevy and delivery of the goods under the original writ was so alleged in the rejoinder in this cause as not to be decisive of the right of action, as a part and not the whole might have been replevied and delivered; and therefore the issue was immaterial and the rejoinder bad.

APPEAL from *Baltimore* county court.

This was an action of *Debt*, instituted by the appellant against the appellee, *Tyson*, and others, as his sureties, on a replevin bond, in the penalty of \$2,000, dated March 31st, 1827.

The pleadings were stated by the Judge, by whom the opinion of this court was delivered, as follows:

This action was instituted in *Baltimore* county court, upon a replevin bond. The defendants pleaded performance generally. To this plea, the plaintiff, after setting out in his replication the proceedings in the action of replevin, and the judgment of the court for a return of the goods and chattels in said suit specified, pleaded that the defendant had not made a return of the said goods and chattels, or any of them, and that he did not prosecute his writ of replevin with effect. To this replication the defendants rejoined, that the goods and chattels mentioned in the replication were not replevied, and delivered to him under or by virtue of the writ of replevin in the replication mentioned; and that he did prosecute his writ of replevin with effect. To this rejoinder the plaintiff demurred, specially for duplicity and other causes therein specified, and the defendants joined in demurrer.

A judgment having been rendered for the defendants on the plaintiff's demurrer to their rejoinder, the plaintiff appealed to this court.

The cause came on to be argued before BUCHANAN, Ch. J., and MARTIN, STEPHEN, ARCHER and DORSEY, J's.

Lloyd for the appellant, contended.

1. The rejoinder is bad for duplicity, because it contains two separate and distinct answers, and offers two distinct issues to the replication. The object of pleading is to bring the controversy to a single point, and though under the statute of *Anne*, several pleas may be pleaded, the same plea must not present two distinct issues. *Stephen Pl.* 155, 264, 265, 267, 294. Neither is it competent to a party to tender too broad an issue so as to blend other obligations with the single one, constituting the defence. *Ib.* 259, 260. If an answer to a plea contains any other fact, in addition to what constitutes of itself a sufficient answer, it is double. *Stephen*, 269, 270. *Owings and Karthaus*, 6 *H. and J.* 134. 2 *Gill and Johns.* 430. Neither should a plea be argumentative. *Stephen*, 384, 385. 2 *Gill and Johns.* 430.

The rejoinder here does not meet the allegations of the replication, that the goods had not been returned, by a positive denial of the fact; but it says that they were not replevied, which, though good as an argument, is bad as a plea. The plea that he did prosecute with effect, admitted the replevying, and he could not afterwards deny it.

2. The rejoinder is a departure from the plea. The plea avers a general performance of the condition of the bond, while the rejoinder, by traversing the replevying and delivering of the goods, confesses the breach of the bond, and sets up matter in avoidance. This defect is fatal on general demurrer. 1 *Saund.* 84, (*D.*) 1 *Chitty Pl.* 619, 620, 621. 3 *Gill and Johns.* 75. The plea is performance, and the rejoinder is merely an excuse for the non-performance, which is a departure. 6 *Com. Dig.* 150. *Letter F.* (7.) 3 *Gill and Johns.* 75.

3. The plea of general performance is bad. It is uncertain and repugnant. It avers in substance, that the defendant prosecuted the writ of replevin with effect, that is, successfully; and at the same time that he made a return of the goods; which is directly inconsistent and contradictory. If he prosecuted with effect he was not bound to return the

goods, and therefore both could not be done. This plea cannot be cured by rejecting any part as surplusage. *Stephen*, 369, 378. To show that general performance to an action on a replevin bond is not good, he cited 1 *Wills*, 5. 6 *Bac. Abr.* 59, *Replevin and Avowry*, letter (D.)

Johnson and *Williams* for the appellees.

1. The objection to the rejoinder is not that the answers to the replication are not relevant and sufficient, but that they are united in the same plea. Now, the rejoinder merely answers the replication, and if there is duplicity in the former, there is also in the latter, and upon the demurrer; you go up to the first fault. 1 *H. and G.* 471. And although the defendant may have demurred to the replication, he was not bound to do so; and if he rejoined, it was necessary that he should answer all the material parts of the replication. 1 *Chitty Pl.* 513.

The replication alleged that the defendant had not returned the goods, &c.; and also, that he had not prosecuted with effect; and as the denial of the first would be no answer to the latter, he was compelled to meet both allegations. If the defendants had merely averred the return of the goods replevied, it would not have been a full defence. An action might still have been maintained on the bond for damages, for taking and detaining the property replevied.

2. The rejoinder is not a departure from the plea. A departure is an abandonment of the last antecedent plea. *Stephen*, 405, 409, 410—and *appendix* 78, note 74.

In this case the plea was performance; which means that the party had done that, which by his bond, he was under a legal obligation to do. The bond does not recite that the party has the goods; on the contrary, it says, "*he is about to take them*," and if he does not take them, he can be under no obligation to return them. The obligation to prosecute with effect does not involve the obligation to return the goods. There is a difference between a replevin and an appeal bond;—the one supersedes the judgment as soon as

it is filed, whilst the other can inflict no injury, unless subsequent proceedings are had upon it. The plea of performance, therefore, is not departed from, by a rejoinder alleging that the goods were not replevied and delivered; because, if such was the case, the party could be under no obligation to return them. *Stephen*, 409, 410. The plea of performance is the same as the plea of *non damnificatus*.

If to a replication such as this, the opposite party is compelled to rejoin that he did return; then he must prove a return, whether in fact he took the goods or not, as the taking would be admitted by the rejoinder.

3. If the plea of general performance is bad, it is only so on special demurrer, upon the ground of duplicity. 3 *Chitty Pl.* 513; and being only objectionable in that way, the replying to it waives the objection. *Stephen*, 163. The plea, however, is good, even on special demurrer. The bond is not like an appeal bond, which binds the party to reverse the judgment or pay the debt, &c. An averment, therefore, that the judgment had been reversed or the debt paid, would be an answer to an action on an appeal bond; for the doing of either pre-supposes the not doing of the other. But such is not the case with a replevin bond, the condition of which is, that he shall prosecute with effect, and *return*, &c. Both, therefore, must be done; because a return of the goods, if the judgment was against the plaintiff, would not discharge him from his liability for taking and keeping them.

Lloyd in reply.

It is said that there is duplicity in the replication, if there is in the rejoinder; and that on the demurrer the court will ascend to the first fault. The answer to this is, that by rejoining, the defendant has waived the objection, even if it were admitted to exist, which however is denied. 3 *Maul. and Selw.* 180. 3 *Chitty Pl.* 244, note (a.)

It has been further argued, that though the defendants might have demurred to the replication, they were not

Doogan vs. Tyson, et al.—1834.

bound to do so; and that if they elected to rejoin, they were bound to answer the whole replication. This is not so, if one answer will cover the whole of the plaintiff's case, as would have been done by the plea that he prosecuted with effect.

In a declaration or replication, many things may be stated conjunctively, which would be improper in a plea or rejoinder.

2. The error on the other side, which has involved them in the consequences of a departure, was in pleading general performance of all the stipulations of the bond, instead of pleading specially that he had not replevied; and to require this, subjects the defendant to no hardship, because he must know, himself, how, and to what extent, he has performed his bond. The plea alleges that he prosecuted with effect, and the rejoinder is that he did not take possession, which does not sustain the plea, but is clearly a departure from it.

3. The objection to the plea is not only that each defence is an answer to the action, but that they are essentially repugnant and contradictory. There is no distinction between an appeal and replevin bond; in either case the condition is complied with, by prosecuting with effect, or abiding by and performing the judgment of the court in the premises.

STEPHEN, J., delivered the opinion of the court.

The questions which this case presents for adjudication are exclusively upon the pleadings, and are not free from difficulty. The object of the replevin bond is, no doubt, the indemnity of the defendant in the replevin suit; and all questions arising upon it should be determined by a due regard to that consideration.

The plaintiff in replevin binds himself to prosecute his suit with effect, and in case the property is adjudged to be restored to the defendant, he is bound to do so, or his bond is forfeited. In consequence of the property being restored

to him by virtue of the writ of replevin, he assumes upon himself, by his bond, this legal responsibility. In 7 *Taunt.* 103, GIBBS, Ch. J., in defining the legal effect and operation of a replevin bond, says,—“What is the cause of action?—The plaintiff distrains for rent on sheriff, who again takes the goods distrained out of the possession of the plaintiff, on entering into a bond in which two others join him; conditioned, if he shall appear and prosecute with effect; and if a return shall be adjudged, and he shall make return, then the bond shall be void. It is too clear to argue. He is bound to do both, as well to prosecute with effect as to make return, if it shall be adjudged; and if he omits to do either, the bond is forfeited, and he is liable to the penalty. The breach averred is, that sheriff did not make return, and inasmuch as it was necessary he should do both, the breach set out is good.” In 11 *Serg. and Lowb.* 236, HALROYD, J., speaking of the obligations imposed by a replevin bond, says,—“The condition of the bond is broken, and the bond forfeited, as well by not prosecuting the suit with effect, as by a default of making a return of the distress, on such return being adjudged, each part of the condition being independent of the other, and the bond forfeited by a failure in either. The failure of prosecuting the suit with success is, we think, a failure of prosecuting the same with effect.”

The pleas to a replevin bond, according to *British* precedents, where the party relies upon performance of its condition, are generally, if not entirely and exclusively, special. That is, the defendant pleads, either that he has prosecuted his suit with effect, and that no return thereof was adjudged. *Wills Rep.* 56. 7 *Wentworth*, 7. 1 *Bos. and Pul.* 410, 411. 12 *East.* 585.

The practice, however, in this state, has been to put in the plea of general performance, as was done in this case; but whether objectionable or not, could only be taken advantage of on special demurrer; and we do not mean to say that it was improperly pleaded. This plea rendered it

Doogan vs. Tyson, et al.—1834.

necessary for the plaintiff to show his cause of action in his replication, and to state the breaches of the condition of the bond upon which he intended to rely. He replied, that the defendant had not made a return of the goods or chattels, or any of them, and that he did not prosecute his writ of replevin with effect. To this replication, assigning a breach of both conditions of the bond, the defendant rejoined, that the goods and chattels mentioned in the replication were not replevied and delivered to him, under or by virtue of the writ of replevin in the replication mentioned, and that he did prosecute his suit of replevin with effect. To this rejoinder the plaintiff demurred specially, and assigned for causes of demurrer, duplicity, departure, and that the issue tendered by the plea of the non-delivery of the goods, under the writ of replevin, was an immaterial one.

We do not think that the rejoinder in this case was bad, or legally objectionable, on the ground of duplicity, even supposing that both the grounds of defence assumed by it were proper and legally efficient, because the double response in the defendant's rejoinder was only an answer to the breaches assigned in the plaintiff's replication. But we think that the defendant's rejoinder is bad in that part of it where he alleges, *that the goods and chattels mentioned in the replication were not replevied and delivered, under or by virtue of the writ of replevin*. Without deciding whether this averment contains matter which is a legal defence to the action or not, it is sufficient to say, that if it is a legal defence, it is so pleaded as to present an immaterial issue for the decision of the jury, whose verdict, if found for the defendant, would not have been decisive of the right of action, as a part of the goods might have been replevied and delivered, although the whole were not; and if the plea contained matter which was not a defence to the action, it was bad upon the demurrer, and the plaintiff was entitled to judgment. For these reasons we think the judgment of the court below ought to be reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

LESSEE OF DULANY and WIFE and DANGERFIELD vs. EDWARD TILGHMAN.—June, 1834.

The legislature has the power to confirm conveyances defectively executed; and acts for that purpose must be carried into effect. The intention of the legislature to confirm a deed must be collected from the nature of the application made to them, and the terms they have used in granting the confirmation.

Where an act of the legislature limiting an estate in real property is inconsistent with the estate granted in a deed, it cannot be relied upon as curing a mere informality in its execution, but must be held to create a new estate.

It is competent for the legislature upon the request of parties, owners of real property, to limit and vest their estates as they desire, or as they could do by deed.

Where a deed of settlement was defectively executed, and the legislature upon the application of the grantors made another settlement, the first deed is not affected by the subsequent legislative general acts intended to cure deeds defectively executed. Such a deed is not embraced by the spirit or intention of those healing acts.

APPEAL from Kent county court.

Ejectment for one moiety of a tract of land called "*Bennett's Lowe*," commenced by the appellants against the appellee, on the 6th of September, 1830.

The cause came before the county court, upon a case stated, by which it appeared, that *Henry Rozier*, and *Eleanor* his wife, were seized of sundry lands, that is to say,—*Rozier* of two tracts, called "*Aquonsick*," and "*Aquonsick Enlarged*," and his wife of the moiety of a tract called "*Bennett's Lowe*," the subject of the present action; that *Rozier* and wife had issue the following children,—*Notley Rozier* their eldest son, *Henry*, *Edward*, and *Thomas W. Rozier*, and that on the 19th of September, 1759, they executed a deed to one *Edward Neale*, the father of *Eleanor Rozier*, of the said lands in trust, that he should hold the same for the term of twenty-one years, to the use of *Henry Rozier*, one of the grantors; and after the expiration of the said term, that the tracts called "*Aquonsick*" and "*Aquonsick Enlarged*," should enure to the use of *Henry Rozier*,

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

one of the sons of the grantors, his heirs and assigns, for ever; and that the moiety of the tract called "*Bennett's Lowe*," should in like manner, after the said term, be held for the use of *Edward*, another of the sons of the grantors; but in case either of the said grantees should die before attaining the age of twenty-one years, then and in that case, the land of the party so dying first, to be held in fee for the use of *Thomas W. Rozier*, the fourth son of the said grantors; with a covenant that the grantor, *Mary Rozier*, during his life, should be entitled to enjoy the rents and profits of the lands, &c." This deed, though operative with respect to the lands of the husband, was not good to pass the land of the wife, in consequence of a defect in the acknowledgement. It was further agreed, that *Edward Rozier*, one of the sons of the grantors, died without issue, under the age of twenty-one years, in the life-time of his brothers *Henry* and *Thomas W. Rozier*, and that *Henry* died intestate, and without issue, having attained the age of twenty-one. That *Thomas W. Rozier* survived his brother *Henry* and *Edward*, and died intestate in 1785, leaving issue an only daughter, *Eleanor Martha Rozier*, his heir at law, who intermarried with *Matthew Tilghman* in January, 1802, and died in February, 1803. That *Henry Rozier* and *Eleanor*, his wife, the grantors in the deed, died, the former in 1802, and the latter in 1798. That on the 21st of May, 1787, the legislature, upon the petition of the grantors in the before mentioned deed, and others, passed "an act for vesting an estate for life in *Henry Rozier*, and estates in fee simple in *Eleanor Rozier*, the daughter of *Thomas W. Rozier*, deceased, and in the heirs of *Notley Rozier*, son of the said *Henry Rozier*, in sundry lands therein mentioned." See *ch. 19* of the acts of April session, 1787. It was further agreed, that the deed required by this law, to be executed by *Henry Rozier*, under the direction of the chancellor, was so executed on the 14th of September, 1790, in favour of the heirs of *Notley Rozier*. Many other facts appear in the statement of the case, but it is not consi-

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

dered necessary to recapitulate them, as the right of the lessors of the plaintiff to recover was conceded on both sides, to depend upon whether *Eleanor M. Rozier*, the daughter of *Thomas W.* and *Eleanor Rozier*, took under the deed of the 19th of September, 1759, or under the act of the legislature of 1787. If under the deed, the lessors were admitted to be the heirs at law of the person last seized, she in that case taking by descent from her father, *Thomas W. Rozier*. If on the contrary, she took under the act of 1787, she was in by purchase, and the plaintiffs are not the heirs at law, and consequently not entitled to recover."

The county court, upon the preceding statement, gave a *pro. forma* judgment for the defendant, from which the plaintiffs prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER and DORSEY, J's.

Chambers for the appellants.

It is not controverted, nor can it be, that the limitations in the deed of 1759 created a springing or shifting use, which in the event of *Edward Rozier's* death, without issue, and under the age of twenty-one, (which the statement admits) vested the fee in "*Bennett's Lowe*" in *Thomas W. Rozier*, had the deed been acknowledged according to the act of assembly. But it is contended that the acknowledgment is defective.

Let it be assumed that the acknowledgment was defective. Did not the act of 1787 pass to give effect to the settlement? The language of the act is,—“This assembly thinking it just and reasonable that the settlement intended to be made by the said *Henry Rozier*, the father, and *Eleanor*, his wife, as a provision for their children should take effect, any informality in the said deed notwithstanding.

The settlement to which the act was to give effect, was the settlement of 1759. The children whose intended pro-

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

vision should be secured according to the design of their parents, were the children of *Henry Rozier*, the elder, of whom *Thomas W. Rozier* was one. The act, therefore, was intended to be confirmatory of the deed, not destructive of it. All its details accord with the idea of setting up and establishing the deed and securing the title under it, and according to its terms. The land is given in fee to the daughter of *Thomas W. Rozier*; dower is secured to the widow of *Thomas W. Rozier*, precisely as she would have received it under the deed. Certainly such a stipulation consists only with the idea of giving efficacy to the deed. The act of assembly is in strict accordance with the principle familiar in the legislation of *Maryland* and other states in the union, if it be intended to cure a defective execution of the deed, and thereby give effect to a contract which good faith and conscience require to be executed. Such laws have been recognized in numerous instances in *Maryland*, whether in relation to individual cases, or to cases in whole classes. The same decision has been obtained elsewhere. *Barnett vs. Barnett*, 15 *Serg. and Rawl.* 72.

But to assume that the legislature intended not to give a remedy, but to seize upon a vested right by a sheer act of arbitrary power, and confer an original title upon another, is to claim for the legislature an authority which it is denied they possess under the constitution of *Maryland*. *Meginnis and Crane* is a late decision of this court, founded on this principle. In *Isaac Austin vs. Trustees of the University of Pennsylvania*, 1 *Yeates*, 260; also cited in *Wharton's Digest*, 111,—such a law was declared unconstitutional in *Pennsylvania*. See also *Vanhorne's lessee vs. Dorrance*, 2 *Dal.* 364. Such a law is contrary to the principles of natural justice, and in violation of any just principle on which legislative authority can be founded. *Jackson vs. Lyon*, 9 *Cowen's Reports*, 664, and the cases there cited show, that in *New York* the courts have decided the legislature has no power to pass such laws as *divest* the

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

title of one to *invest* it in another. The same doctrine will be found in 15 *Mass. Rep.* 454. 16 *Mass. Rep.* 270. 3 *Story's Com.* 268. 2 *Peters' Rep.* 629.

To assume, therefore, that the act of assembly was intended to act originally upon the title, regardless of the deed, and directly to convey by the authority of the legislature to *Eleanor M. Rozier*, a title which belonged to other persons, is to impute to those who made it, a high-handed exercise of power, not lawfully possessed by them, and to place the court under the necessity of repudiating the act as altogether without constitutional warrant, and this too, without necessity; because by considering it as a confirmation of the deed of 1759, its enactments are warranted by those principles on which, in this State and elsewhere, statutes to carry into effect the true intent and meaning of contracting parties, by curing and relieving defects either in the expressions used, supplying other expressions, or in the want of formalities in the execution or acknowledgment, have been considered perfectly constitutional.

It is but common charity and courtesy then to assume, that the act of 1787 was remedial and curative, and intended to accomplish that which its language and details purport—to confirm the deed of settlement in specie—and that whatever the parties took, they should take under the settlement as reintegrated and confirmed.

There is nothing to justify the idea that the legislature intended to give a new title or an original estate. Whence did the legislature derive a title which they could transfer? The State clearly had none—it claimed none. As a grant of a new title or estate, it was obviously useless and unnecessary to ask the intervention of the legislature, inasmuch as the title remained in *Henry Rozier*, the elder, and *Eleanor*, his wife, in right of the wife, if their deed did not convey it, and being in them, they could have conveyed it according to their will and pleasure, and with much less trouble and expense, than they must necessarily encounter

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

in obtaining an act of assembly, and then going through a Chancery proceeding, and after all, executing a deed by *Henry Rozier*. But upon the hypothesis of curing the defect in the deed, all this trouble and expense was necessary, the act of assembly alone being competent to give effect specifically to the deed of settlement.

The possession has been in strict pursuance to the deed of settlement. From 1759 to 1787 there was no pretence of any other title. The case expressly states, that *Henry Rozier*, from the time of *Edward Neale's* death, in 1760, remained in possession until 1792, when he conveyed his life estate to *Eleanor M. Rozier*. And the possession of *Eleanor M. Rozier* and those claiming under the deed since then, is admitted. The act of assembly having been passed to confirm the deed of settlement and give effect to it, did not create an adverse interest which was held and claimed by those in possession, but precisely the reverse; it quieted the possession of those holding under the deed.

It is remarkable that the act of assembly concludes by an expression, importing that the heirs of *Notley Rozier* held the moiety of "*Bennett's Lowe*." This must allude to the moiety of the tract conveyed, or intended to be conveyed in the deed of settlement, because the other moiety of the tract had been in the partition, prior to 1759, conveyed to *Notley Young* and wife, and has continually, for that time, been in possession of that family.

Now it is certain, that if the deed was so defective that it did not pass the title of *Mrs. Rozier*, the grantor, then *Notley Rozier's* heirs had not a shadow of title; and as to possession, all idea of it is excluded, whether we look to the provisions of the deed or those of the act of assembly, and as above stated, the facts agreed on expressly negative it. The circumstance, therefore, evinces the necessity of regarding the general object and peculiar intention of the act, rather than the precise words which, in some part of it, indicate a grant or conveyance of a new estate. Such a

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

construction is also in accordance with well established principles of law, which require the whole proceeding,—deed, petition, and act, to be considered as one transaction, and to receive effect according to the design and intent of the parties.

The act of 1787 being therefore intended to remedy any defect or informality, either in the language of the deed of settlement, or in the mode of acknowledging it, the effect was to give full effect and operation to the deed, as a valid and operative instrument, competent to pass the estate in the lands according to the intention of the parties.

The act relates back to the deed, and gives it force and vigour, from 1759. 1 *Price*, 381. *Attorney General vs. Pougett*, cited 2 *Harr. Dig.* 509. An act passed to correct an error in a former statute of the same session, relates back to the time when the first act passed, and may be read as a part of it, and incorporated in it.

When a deed is acknowledged, it is valid by relation back to the time of its execution. *Cox's Dig.* 7, case 5. *Wood vs. Owings*, 1 *Cranch*, 239. Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation. *Vin. Abrid. Tit. Relation*, 290. *Harper vs. Bailiff of Derby*, cited and approved. 3 *Cowen's Rep.* 80, where is also cited the case of *Jackson vs. Bull*, 1 *Johns. Cases*, 81. A deed executed in pursuance of a previous contract for the same premises, is good by relation from the time of making the contract, so as to render valid every intermediate sale or disposition by the grantees. The principal case in *Cowen* decides, that the deed of the sheriff related back to, and was to be considered as executed at the time of the sale, four years or more previous to the date of the deed.

There are numerous instances in the *Maryland Reports* of decisions upon deeds, the defects of which, and particularly in the acknowledgment, have been remedied by acts of assembly; and in all has been considered as made valid

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

and operative from its date, and not from the time of passing the remedial law. All those deeds which by the acts of 1807 and 1809 are made operative to pass the title, notwithstanding their defective acknowledgment, undoubtedly take effect from the time of execution. Does not a particular law, remedying a defect in a particular deed, produce precisely the same effect in regard to that deed that these general laws do in regard to deeds generally?

If it be objected, that in these general laws there are words expressly enacting that the deeds shall operate and be valid from the time of their execution respectively, the answer is, that no form of words is essential to confirm a deed.

The *English* doctrine is, that the deed of a *feme covert* is void, and not voidable only, and yet in *Goodright vs. Straphan*, Cowp. 201, the court decided that the re-delivery of a deed by *feme*, after death of baron, was a sufficient confirmation without re-execution, and that circumstances alone were equivalent to a re-delivery, though the deed was a joint one of baron and *feme*. A deed recorded by decree of the Chancellor has effect from its date. 1 *Harr. and Johns*. 180.

The parties who would have derived title under the deed of settlement, had no defect existed, have held continually under the deed. That possession has continued from 1759, the date of the deed, until the death of *Matthew Tilghman*, the last person entitled. No adverse claim has ever been enforced. Admit, if you please, that in 1787 a purchase of peace was effected through the instrumentality of the act of assembly, and the proceedings under it. Still this was to secure a continued holding under the deed, and it was secured, and the holding was accordingly under the deed. Can it be said that this attempt to quiet the title under the deed will prevent the holders under it from being relieved by the general quieting acts of 1807 and 1809?

Henry Rozier conveyed lands to the heirs of *Notley*

Rozier, and these heirs received the lands thus conveyed, and accepted them as one inducement to forbear prosecuting their supposed title to the lands now claimed. And this is a sort of bargain by which *Henry Rozier* bought their title. All this may be urged. To see whether it presents any substantial objection to the plaintiff's pretensions, let us illustrate it by a familiar case.

Take any one of the numerous cases falling within the general act of 1807, *ch. 52*, in which several descents had been cast. Suppose *A*, the purchaser from *H* and wife; and that *H* and wife conveyed to *A*, by a deed defectively acknowledged; that *A* having died, *B*, his heir at law, was challenged by *I*, the heir at law of *H* and wife, and threatened with a suit; and to avoid suit, conveys land or pays money—that *C*, the heir of *B*, is again threatened by *I*, or his heir, and that he too pays peace money, and died leaving the property in the hands of *D*, his heir at law, when the act of 1807 is passed curing the defect in the deed of *H* and wife to *A*; could there be any doubt that the deed of *H* and wife to *A* was the foundation of the title of *A*, *B*, *C*, and *D*? If *D* should die intestate, without children, would any question be made, or any difficulty exist, whether the descent was to be traced through the whole line of ancestors to *A*? Certainly not.

It is, therefore, respectfully submitted, that the foundation and origin of the title is the deed of settlement of 1759. That the act of 1787 did not profess, in fact, to divest the title of any other person, and vest it in *Eleanor M. Rozier*; and if it did, that it essayed to do that, which this court will adjudge to have been beyond its constitutional power, and that the act is therefore utterly inoperative.

2. That the possession has followed the deed of settlement from its date in 1759, to the death of *Matthew Tilghman* in 1828.

3. That the deed was confirmed, and any defect in its acknowledgment cured by the act of 1787, to effect which, was the sole object of that act—and also by the terms of the

Lessee of Dulany and Wife and Dangerfield *vs.* Tilghman.—1834.

acts of 1807, *ch.* 52, and 1809, *ch.* 164. From which it follows, that the title derived under the deed to *Eleanor M. Rozier*, by descent, as heir at law to *Thomas W. Rozier*, her father, descended again upon the death of her infant child and heir, and upon the death of her husband, *Matthew Tilghman*, to the plaintiff's lessors, who are the heirs of the said *Eleanor M. Rozier*, *ex parte paterna*, and who are therefore entitled to the judgment of the court.

Bullitt and *W. Carmichael*, for the appellee.

The deed of 1759, though good for the property of the husband, was some years after its execution found to be defective as to the property of the wife—no doubt the wife might have made another deed for her property, and disposed of the same in such way as to her seemed proper; and if she had done so, the appellants might not have obtained the lands now held by them, under the act of assembly, as a compensation for nothing, for they had no title to "*Bennett's Lowe*," under the deed of 1759. The wife, to whom "*Bennett's Lowe*" belonged, and her friends, under existing circumstances, thought it better, it seems, to apply to the general assembly to make a settlement of her property for them. Application was made to the general assembly, setting forth the deed of 1759 and other facts, and praying that a settlement of her property might be made in a certain way—not that the deed of 1759 should be confirmed. The general assembly assented to the application, and made a settlement of not only all the property mentioned in the deed, but of other lands equal in value to "*Bennett's Lowe*." The act of assembly operates as an original, independent settlement, and not as a confirmation of the deed, though agreeably to the suggestion of the application, "*Bennett's Lowe*" is substantially disposed of, according to the effect of the deed, had it been good in its creation. We must take the act as we find it. It professes to be an act not to confirm a deed, but an act for vesting an estate for life in *Henry Rozier*, and estates in fee simple in *Eleanor*

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

Rozier, the daughter of *Thomas Whittinghall Rozier*, deceased, and in the heirs of *Notley Rozier*, son of said *Henry Rozier*, in sundry lands therein mentioned. It proceeds to recite several facts set forth in the petition, and declares that the petitioners have prayed that an act may pass for vesting an estate in fee simple, in a moiety of "*Bennett's Lowe*" in *Eleanor Rozier*, &c. It further declares, that the assembly, thinking it just that the settlement intended to be made by *Rozier* and wife as a provision for their children, should take effect—therefore enacts, that an estate in fee simple be, and is hereby vested in *Eleanor Rozier*, of and in the moiety of "*Bennett's Lowe*," &c., provided *Henry Rozier* shall settle lands of equal value on the heirs of *Notley Rozier*. The act says nothing about a confirmation of the deed, but settles certain lands, for the most part, in conformity with the deed, provided *Henry Rozier* shall settle lands of a certain value on the heirs of *Notley Rozier*. There is no provision of this kind in the deed, but the assembly supposing, contrary to the fact, that the heirs of *Notley Rozier* had some right to "*Bennett's Lowe*," determined that they should not be deprived of that right, without full compensation. Nothing is taken from the heirs of *Notley Rozier* by the act, though much is given them, with which it seems they are not content. The act has gone further than the deed, and contains provisions not in the deed; therefore, it is contended that *Eleanor Rozier* took by purchase under the act, and not by descent under the deed. It is asked from whom the purchase was made? It is not necessary to answer the question; there are known to the law two modes of acquiring lands, and two only; that is, by descent and by purchase. If *Eleanor M. Rozier* did not take the land in question by descent from her father, she took it by purchase, under the act of assembly; for it is a well settled rule, that where land is acquired by any means save by descent, it is acquired by purchase. But in this case there was a purchase in fact, through the intervention of the legislature, by

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

Henry Rozier, from the heirs of *Notley Rozier*, for the benefit of the daughter of *Thomas W. Rozier*. *Henry Rozier* gave in exchange lands of equal value with "*Bennett's Lowe*," though the heirs of *Notley Rozier* had no title to the same.

If the act of 1787 did not cure and confirm the deed of 1759, it is contended by the plaintiffs that the general remedial acts of 1807 and 1809 must have that effect. The act of 1787 did not operate on the deed, but upon the subject matter of the deed. The act made a settlement of the lands contained in the deed, agreeably to the prayer of the petition, substantially in conformity with the deed, and did more, that is, it required a settlement of other lands.

Can it be supposed that the acts of 1807 and 1809 intended to repeal the act of 1787, and make void the settlement thereby established? I think not. These remedial acts were intended only to confirm deeds, upon which no action had taken place, and these acts certainly take property from one and give it to another. These acts are not considered a violation of the constitution. The act of 1787 takes nothing from the heirs of *Notley Rozier*, but gives them more than they ought to have; and, therefore, cannot be a violation of the constitution. The deed is also within the exceptions of the two acts. Possession is relied on; it proves nothing. *Neale* possessed to the day of his death; he had a right to do so, as tenant by the courtesy. *Henry Rozier* also possessed until the date of his deed to his grand-daughter. He also had the right to do so, as tenant by the courtesy. It does not appear then that either possessed under the deed, as they had the right to possess, had there been no deed. The truth no doubt is, that *Neale* possessed as tenant by the courtesy, and *Henry Rozier* possessed under the deed, until it was found to be defective; and then possessed under the act of 1787; and all others possessed under that act.

The heirs of *Notley Rozier* have for many years acquiesced in the settlement made by the act of 1787; have held

Lessee of Dulany and Wife and Dangerfield *vs.* Tilghman.—1834.

and enjoyed the land given to them as a compensation for "*Bennett's Lowe*," and still hold and enjoy the same, whereby they have confirmed that settlement. They referred in the argument to 1 *Harr. and Johns.* 291, 513. 2 *Ib.* 62, 230. 1 *Atk.* 489. 3 *Burr.* 1794. 2 *Vern.* 275. 2 *Black. Com.* 201, 241. 4 *Harr. and Johns.* 245. *The acts of 1807, ch. 52; and 1809, ch. 164. Hob. 173. Cro. Jac. 481. 1 H. Black. 65.*

DORSEY, J., delivered the opinion of the court.

The argument on both sides concedes, that the deed of 1759 (by reason of the insufficiency of the acknowledgment thereof) unsupported by any subsequent legislation, was insufficient to pass such interest in the real estate in question, as resided in the *feme-covert* grantor, *Eleanor Rozier*, at the time of its execution. But it is insisted by the appellant's counsel, that this defect is cured by the act of the general assembly of *Maryland*, passed at April session, 1787, *ch. 19*, which it is alleged was enacted for the remedy thereof, and for no other purpose; and that the sole object of the applicants for this law, and of the legislature in passing it, was the passage of an act confirmatory of the deed of 1759, and the giving it the same effect and operation as if the acknowledgment of its grantors had been taken according to the form prescribed by law. If we could be convinced that such was the design of the legislature, it must be carried into effect. But their intention must be ascertained, not by remote inferences or vague conjecture, but collected from the nature of the application made to them, and the terms they have used in granting it. Of the contents of the petition presented to the general assembly, we have no knowledge, but as they are recited in the preamble to the laws, which states that the petition set forth, not the fact that the deed of 1759 was inoperative or insufficient, by reason of the informality in the acknowledgment of the *feme covert*, and prayed for the passage of an act curing that defect, and giving to the deed the same

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

operation as if it had been obnoxious to no such objection ; but after detailing the provisions of the deed, states, that the petitioners conceiving the deed of bargain and sale so executed insufficient in law for settling the lands according to the purposes therein mentioned, have prayed that an act may pass for vesting an estate in fee simple in the said moiety of the land called "*Bennett's Lowe*," in the said *Eleanor*, the daughter of the said *Thomas W. Rozier*, subject to an estate for life in the same, in the said *Henry Rozier*, the father ; and after his death, to the dower of the said *Eleanor Rozier*, the younger, the mother of the said infant daughter, and also for vesting an estate in fee simple in the said tracts of land called "*Aquonsick*," and "*Aquonsick Enlarged*," in the heirs of the said *Notley Rozier*, deceased, the eldest son of the petitioners, *Henry Rozier*, and *Eleanor*, his wife. In this petition, as inserted in the preamble of the act of assembly, there is not one word or expression distinctly intimating that the petitioners were aware of the insufficiency of the acknowledgment to the deed ; not the slightest intimation of a wish for the passage of a law curing such defect, and confirmatory of the deed. From the circumstances before us, to impute to them such knowledge, and such a design, appears to us irrational in the extreme. If cognizant of the inadequacy of the acknowledgment of the *feme covert* to pass her estate, they as well as the general assembly, *ex natura rei*, knew that the property remained in her ; and that she and her husband, without any legislative auxiliary interposition, could at any moment execute a new deed, conveying the same according to their wishes. Possessed of such knowledge, can it for one moment be believed, that the petitioners would have put themselves to the trouble of applying to the legislature on the subject. Nay—would they have listened under such circumstances to the exorbitant, unaccountable, and oppressive condition, imposed by the legislature, that lands of equal value with the moiety of "*Bennett's Lowe*," should be conveyed by *Henry Rozier* to

Notley Rozier's heirs, before the deed of settlement should be confirmed? Can it be supposed if this were the informality to be rectified, that where the petitioners, *proprio jure*, had all the right and power necessary to do that, for which they asked the legislative sanction, that when they offered to settle upon *Notley Rozier's* heirs, more than one thousand acres of land, and contrary to the tenor of their deed, to relinquish *Henry Rozier's* life estate therein, that the legislature of *Maryland*, whilst they sanctioned without scruple or restriction, the proposed settlement on *Notley Rozier's* heirs, would have imposed on the petitioners, the extravagant and unreasonable condition, that their assent to the settlement on *Thomas W. Rozier's* infant heir was only given, provided an additional settlement of lands of equal value with that made on *Thomas W. Rozier's* heirs were added to the settlement proposed to be made on *Notley Rozier's* heirs.

According to the petition, *Henry Rozier* and *Eleanor* his wife, in right of the said *Eleanor*, were entitled to the tracts of land called *Aquonsick* and *Aquonsick Enlarged*, and a moiety of the tract of land called *Bennett's Lowe*, and by their deed of settlement of 1759 had, reserving the life estate of *Henry Rozier*, attempted to convey the two first mentioned tracts to their son *Henry Rozier* in fee, with a limitation over on a contingency, which never happened, and the moiety of *Bennett's Lowe*, after a like life estate, to their son *Edward Rozier* in fee, with a limitation over in fee, to their son *Thomas W. Rozier*, on a contingency which did happen; and according to the assumptions of the defendants' counsel, this conveyance was wholly inoperative, by reason of the informality of the acknowledgment of *Eleanor Rozier*, the mother; her right to, and controul over these lands remaining unimpaired, and with a perfect knowledge of these facts, and their rights, the petitioners applied to the general assembly to give their sanction and confirmation of this deed. If the legislature were willing to act in such a case, as it appears they were, could they as far

as *Notley Rozier's* heirs were concerned, have hesitated for a moment to ratify the settlement upon the terms proposed by the petitioners? The property all belonged to *Henry Rozier* and wife; they prayed that it might pass to their descendants, in accordance with their deed of settlement, executed nearly thirty years before, except that *Henry Rozier* voluntarily relinquished his life estate, reserved by the deed in *Aquonsick* and *Aquonsick Enlarged*, the lands which had descended to the heirs of *Notley Rozier*, had the deed been of any validity, and which it was the design of the petitioners to settle upon them. Could the legislature have objected to the natural justice and equity of the settlement proposed? Could they, under such circumstances, have sought to impose other terms upon the petitioners than those which the petitioners offered? It is impossible to believe it. But the legislature did impose her terms. Whilst they confirmed all the bountiful intentions of the petitioners towards the heirs of *Notley Rozier*, they refused their sanction to those in favor of the heir of *Thomas W. Rozier*—but upon the inconsistent, unreasonable condition, that *Henry Rozier*, the father, should first convey to *Notley Rozier's* heirs land of equal value with the moiety of *Bennett's Lowe*. The inference is irresistible; the legislature did not act on that state of facts which has been assumed on the part of the appellants.

They did not legislate to cure a mere informality in a *feme covert's* acknowledgment of a deed, where the right of property still remained in the grantors, who were competent and anxious to give validity to the deed; but they conceived they were called upon to cure, not an informality in the execution of the deed, but an informality or defect in the body of the deed, which has been so drawn as not to effectuate the intention of the grantors; a defect incurable but by legislative interposition. They believed that the limitation over to *Thomas W. Rozier*, his heirs, by a defect in the form of drawing the deed, had failed to take effect, and that the moiety of *Bennett's Lowe* had vested in

Lessee of Dulany and Wife and Dangerfield vs. Tilghman.—1834.

Notley Rozier, as heir at law of *Edward Rozier*; and such were the impressions of the petitioners, or they never would have troubled the legislature upon the subject, or submitted to the unjust and unconscientious condition imposed on them by the act of assembly. And this condition is undeniably proved by the concluding words of the proviso to the act, which states, "that the said *Henry Rozier* shall, under the direction of the Chancellor, settle lands of equal value with the moiety of the said tract of land called *Bennett's Lowe*, on the heirs of *Notley Rozier*, deceased, in the same manner, and with the same limitations, that the heirs of the said *Notley Rozier*, deceased, now hold the aforesaid moiety of the said tract of land called *Bennett's Lowe*. If the defect to be cured was in the acknowledgment of the deed, the right of property would have continued in the *feme covert*, without any pretence of title in *Notley Rozier's* heirs; consequently, the heirs of *Notley Rozier*, taking no other interest in the lands of equivalent value, than they held in the moiety of *Bennett's Lowe*, would, according to the terms of the act of assembly, have acquired nothing by the conveyance executed under the direction of the Chancellor. At all events, this clause in the act of assembly demonstrates that the design of the legislature was not merely to cure a defective acknowledgment—to aid *Eleanor Rozier* to settle her property upon her descendants according to her wishes; but to *divest* the heirs of *Notley Rozier* of a moiety of *Bennett's Lowe*, (which the law assumes that they then held,) and to invest the fee simple in the same in the daughter of *Thomas W. Rozier*. No other rational interposition can be given to this act of assembly.

The petition to the legislature does not pray for a confirmation, or curing the defective deed from *Henry Rozier*, and *Eleanor* his wife, to *Edward Neale*. The legislature in their preamble, do not say that any confirmatory act ought to pass; but that, "this assembly thinking it just and reasonable, that the settlement intended to be made by the

Lessee of Dulaty and Wife and Dangerfield vs. Tilghman.—1834.

said *Henry Rozier*, the father, and *Eleanor*, his wife, as a provision for their children should take effect, any informalities in the said deed notwithstanding." Therefore, be it enacted, &c.; giving estates, not such as the deed gave, but such as the act of assembly prescribed, corresponding, or consistent for the most part, with those intended to have been given by the deed, but differing from them in some essential particulars; no estate was to pass to *Eleanor Rozier*, the grand-daughter of the grantors, until its full value had passed to the heirs of *Notley Rozier*, by the conveyance to them of the other lands by *Henry Rozier*; thus giving to the transaction the character of a purchase or exchange of lands by the grand-father for the benefit of the grand-daughter; the legislature authorizing the transfer (after full consideration shall have been received,) of the lands of the infant heirs of *Notley Rozier*, made under the judicial sanction of the appropriate guardian of their rights, a court of Chancery; nay, so studious were the legislature in securing an ample indemnity to the infant heirs of *Notley Rozier*, that by the terms on which their divesture of the moiety of *Bennett's Lowe* took place, they were not only indemnified by the conveyance of lands of equal value, but in addition thereto, were relieved from *Henry Rozier's* life estate in *Aquonsick* and *Aquonsick Enlarged*; thus receiving, most probably, at least one-third more than the value of the property which it was contemplated should pass from them by this legislative exchange. When the legislature say, that the settlement intended to be made by *Henry Rozier*, and *Eleanor*, his wife, ought to be carried into effect, they do not mean, that the deed ought to be confirmed, but that the property therein mentioned ought to pass in the manner set forth in the deed. The settlement intended, and the deed executed for its accomplishment, are separate and distinct things. The deed might be abandoned or annulled, and yet in the language of the general assembly, the settlement intended ought to be

carried into effect: it might be effectuated by an independent deed or by legislative enactment.

The act of 1787 is not confirmatory of the entire settlement in the deed of 1759, because it takes from *Henry Rozier* the life estate thereby secured to him in the tracts of land called *Aquonsick* and *Aquonsick Enlarged*, and gives an estate of dower in the moiety of *Bennett's Lowe* to *Thomas W. Rozier's* widow, to which, under the deed, she was not entitled; neither is it a simple confirmation of that part of the deed by which a moiety of *Bennett's Lowe* was intended to be conveyed to *Eleanor Rozier*, the granddaughter of the grantors, because it fixes upon it a dower right, not derived under the deed. Had the petitioners, as contended, merely sought the passage of an act curing the defective acknowledgment of the deed, their wishes would have been distinctly avowed in their petition. Had the legislature designed to grant such an application to pass a mere confirmatory law, they would have used appropriate terms to express such, their intention. All prior and subsequent applications, and legislation upon such subjects, demonstrate this fact. There was no reason for making it an act of confirmation; every presumable object of the *general assembly*, and of the petitioners, would have been as effectually accomplished by the act, if not deemed confirmatory, as if it were so regarded. Nay, if it be viewed as a mere confirmatory act, the design of the petitioners would not be fully gratified. *Thomas W. Rozier's* widow, in that case, would not be endowed; but looking to the act of assembly as of that independent character, which upon its face it purports to be, every object that the parties interested or the legislature could be presumed to have anticipated, was fully gratified. It gave to *Henry Rozier* the faculty of investing a fee simple estate in his grand-daughter in a moiety of *Bennett's Lowe*, upon the terms and conditions on which it was asked for, with the further condition imposed by the legislature.

Lessee of Dulany and Wife and Dangerfield *vs.* Tilghman.—1834.

The supposed informality which caused the petition to the legislature, and to remedy which, they consented to lend it their aid, was in all probability the offspring of a misconception of the legal effect and operation of the deed of 1759. Applying it to the principle applicable to common law conveyances, that a fee cannot be limited upon fee—that such a limitation over is void—and that the entire estate vests absolutely in the first takers, the petitioners and the general assembly appear to have acted under the impression that the grant to *Henry Rozier* vested in him the entire property,—that the conditional limitations over to *Thomas W. Rozier* and his heirs was wholly inoperative; and consequently, that upon the death of *Edward Rozier* without issue, the fee in the moiety of *Bennett's Lowe* was cast by descent upon the heirs of *Notley Rozier*. To correct this imaginary frustration of the intention of the grantors, under the deed of 1759, was as well the object of the petitioners as of the *general assembly*. Whether if the rights of the parties had been as they were assumed to be, the legislative enactments of 1787 were nugatory and void; as an unauthorized usurpation of a power denied to the legislature, upon principles of common right or constitutional restriction, is a question which the views we have taken of this case render it unnecessary for us to consider. The title of the property, by reason of the defective acknowledgment remaining in the petitioners, it was unquestionably competent for the legislature, at their request, to settle it in the mode prescribed by the act of assembly.

But it is alleged, that by the curing acts of 1807 and 1809, the property in question is made to pass under the deed of 1759, in the same manner as if the acknowledgment stood free from all exception, and the act of 1787 had never passed. Such was not the design of the general assembly in their enactments of 1807 and 1809. They had previously settled the rights of the parties to the property in dispute, by the most solemn legislative sanctions, and nothing was

Goodhand vs. Benton, Jr.—1834.

farther from their intentions than to disturb the settlement thus made, or legislate in reference to the deed embracing the property thus disposed of,—even if the case were included within the letter of those enactments, being without their spirit, it would not be embraced by them.

JUDGMENT AFFIRMED.

CHRISTOPHER GOODHAND vs. VINCENT BENTON, JR.—
E. S., June, 1834.

A witness who has given testimony of the occurrence of any event, *at a particular period*, the time of which is material, can strengthen his evidence by proving that it happened at the same time with, or before, or after, a particular epoch or transaction, the date of which can be proved with greater certainty.

Evidence offered under a cross examination, as well as on an examination in chief, must be pertinent to the issue, or have some connexion with, or immediate influence on, material evidence adduced on the trial.

A witness cannot be cross-examined upon irrelevant matter, impertinent to the issues in the cause, for the purpose of impeaching him; and when such immaterial evidence has been brought out, it will not authorize the introduction of contradictory proof for such purposes merely.

APPEAL from *Queen Ann's* county court.

This was an action of *Replevin*, commenced by the appellee against the appellant, on the 17th day of October, 1831, for negro boy named *Bill*. Issues were joined upon the pleas of *non cepit*, and property in defendant.

1. At the trial the plaintiff having read to the jury a bill of sale from *Charles M. Stevenson* to *Mary Ann Burgess*, daughter of *George B.* and *Isabella Burgess*, dated February 20th, 1817, of a negro woman named *Rhoda*, and a boy *Bill*, the subject of the present action; and a variety of parol evidence having been offered on either side, a witness named *Thomas Thomas* was called by the plaintiff, who proved that he knew *Rhoda* in 1817, when she lived with

Goodhand vs. Benton, Jr.—1834.

George B. Burgess. That the father of witness lived on the farm of *Mary Burgess*, who was a lunatic, and for whom *George B. Burgess* was trustee. That witness, in December, 1817, went to the house of *George B. Burgess*, who then resided in *Church Hill*, to settle with him for the rent of the farm, and that he then saw *Rhoda's* child, at that time an infant. That he took out letters of administration on the estate of his father, *James Thomas*, in June, 1817, and that he did not go to settle with *Burgess* until after he had taken letters. That he saw *Rill* again in the spring of the year 1818, when he again went to the farm of *George B. Burgess*. On the cross examination the witness said, that he did not apply to *Burgess* to know the state of his father's accounts before the date of his letters, that he knew the state of the accounts;—and being further cross examined on that subject, said his father was indebted to *Burgess* for a store account, and for the hire of a negro man, and for a balance of rent. That the rent was not settled between him and *Burgess*; but they differing, the subject was referred, and was before the arbitrators two years or more; and that he had never charged his father's estate for the rent in any account passed by him with the Orphans court; and that the amount of the store account, hire, &c., and all his, *Burgess'*, other accounts, except the rent, were included in one account.

The plaintiff then produced a copy of the letters of administration granted to the witness, to prove that they were dated in June, 1817, to corroborate the testimony before given by him. The defendant thereupon offered to produce in evidence an account settled with the Orphan's court by the witness, *Thomas Thomas*, as administrator of *James Thomas*, on the 18th of June, 1818, declaring his object to be to contradict *Thomas Thomas*, and to impeach the accuracy of his recollection, in regard to his having settled the account for rent, and as to the time expended in investigating the claim before the arbitrators. But the court (EARLE, Ch. J., and HOPPER and ECCLESTON, A.

J's,) refused to permit the said account to be read to the jury, for the purposes for which the same was offered; being of opinion that the evidence on the first part of the cross examination was collateral and irrelevant to the issues, and that the account cannot be used for the purpose of discrediting the witness, or of showing the inaccuracy of his memory on the cross examination. The defendant excepted.

2. Upon the evidence in the preceding bill of exceptions, and after the court had given the opinion therein expressed, the defendant's counsel moved an instruction to the jury, that they ought not to regard the testimony of the letters of administration which had been offered by the plaintiff, to confirm the recollection of *Thomas Thomas*, the same not being competent and legal testimony; but the court refused the application, and instructed the jury that the letters were properly offered, being competent and legal evidence in the case. The defendant excepted, and the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, and DORSEY, J's.

Spencer for the appellant.

1. It is the province of the jury to weigh the capacity of witnesses, and when there are conflicting witnesses to facts depending on the faculty of memory, it is competent on the cross examination to inquire as to collateral facts, in order that the jury may understand what degree of credit the witness is entitled to.

2. Where one witness gives stronger signs of memory than another, he is the rather to be credited, and in order to enable the jury to ascertain the extent and degree of the faculty belonging to the witness, it is proper and right to examine him as to collateral facts, and to contradict him by other testimony shewing the inaccuracy of his memory.

Goodhand vs. Benton, Jr.—1834.

3. If, however, the opinion of the court in the first exception is sound, then the letters of administration offered by the plaintiff were collateral and irrelevant, and ought to have been rejected. He cited 1 *Stark. Ev.* 135. *Randall's Peake*, 130. 7 *East.* 108. 2 *Sand. Pl. & Ev.* 952. 2 *Stark. Ev.* 455, 516. 1 *Loft Gib.* 298, 299.

Wm. Carmichael for the appellee.

Referred to *Phil. Ev.* 210. 5 *Harr. and Johns.* 51. 4 *Stark. Ev.* 380. 1 *Stark. Ev.* 40. 2 *Campb.* 638. 1 *Johns. Dig.* 1060.

DORSEY, J., delivered the opinion of the court.

The question which arises on the *second* bill of exceptions is one which has been so long settled by the universal practice of courts of justice; is so deeply rooted in the plainest principles of reason, justice, and common sense, that it was a matter of some surprise to find it made the subject of grave discussion in this State, in the appellate tribunal of last resort. It is, whether a witness who has given testimony of the occurrence of any event, at a particular period, the time of which is material, can be permitted to strengthen his evidence, by proving that it happened simultaneously with, or before, or after a particular epoch or transaction, the date of which can be proved with greater certainty. Of the legality and propriety of such proof, we cannot be induced to entertain the shadow of a doubt. In the refusal and instruction, therefore, given by the county court in the second bill of exceptions, we entirely concur.

The *first* bill of exceptions presents a very different enquiry. It has been contended by the appellant's counsel, that whether the subject matter of a cross examination has any relevancy or bearing upon the issues made up in the cause, or has any immediate connection with, or pertinence to, any material testimony offered in relation to such issues, is wholly immaterial. That in a cross examination for the purpose of impeaching the testimony of a witness, or in-

volving him in contradictions, or shewing his ignorance, or the inaccuracy of his memory, he may be interrogated as to any thing and every thing, without reference to its relevancy to the issues, which by the pleadings in the cause have been submitted to the jury. To such an unreasonable, pernicious, and latitudinarian principle, this court can never yield its sanction. The evidence offered under a cross examination, as well as an examination in chief, must be pertinent to the issue, or have some connection with and immediate influence on material testimony adduced on the trial. The unjust and mischievous consequences that would result from the opposite doctrine, are too apparent to be for a moment overlooked. Trials might be rendered almost interminable; a single witness might be compelled to endure a week's examination. He might not only be examined as to every thing he had ever seen, heard or thought of, but as to every thing that had entered the imagination of man. Witnesses without number might be produced to sustain and impeach his testimony; and the jury, instead of trying the issues joined in the cause, might be required to determine a thousand independent, unconnected issues, or matters of fact in which they might be involved by surprise, in the progress of the cause. The confusion and injustice, both to witnesses and parties, resulting from such a course of proceeding, are incalculable. No witness, however fortified by purity of character and rectitude of intention, would willingly enter a court of justice, where he might be called upon to unfold to the public ear every transaction and thought of his life; and then leave his testimony impeached and discredited, by proof, of which he could have no previous knowledge or anticipation, and consequently had no means of explaining or refuting. No suitor could go safely to trial, let the respectability of his witnesses for veracity and integrity be what it might—such being the imperfection of all knowledge of facts derived through the medium of our senses,—such the frailty of memory, that perhaps there lives not a

human being who could pass through such an ordeal unscathed—whose statements upon some subject or other might not be contradicted, or assailed by the testimony of other witnesses.

The counsel for the appellant has insisted, in an argument of great length, that it is the province of the jury to judge of the credit due to the witnesses, by the degree of intelligence and accuracy of memory evinced by them in their examination; and that their means of forming such judgment are wholly inadequate, if the latitude of cross examination be less extensive than that for which he has contended. The extent to which a jury are required to form an estimate of the intellects and memory of witnesses from their examination in court, is confined to a due appreciation of their testimony, elicited by interrogatories within the limits we have prescribed. If it be desirable further to enlighten the jury upon such subjects, it must be done by a resort to other means than a mere cross examination.

Having disposed of the question, as far as regards the abstract power of the appellant, in the cross examination of the witness, let us now apply the principles of our decision to test the accuracy of the court's opinion in the first bill of exceptions. The witness, *Thomas Thomas*, in his examination in chief, had testified that he knew *Rhoda*, the mother of *Bill*, in 1817, when she lived with *George B. Burgess*; that his father at the time of his death lived on the farm of *Mary Burgess*, who was a lunatic, and for whom *George B. Burgess* was trustee; that the witness, in December, 1817, went to the house of *George B. Burgess*, who then resided in *Church Hill*, to settle with *Burgess* for the rent of the farm, and that while there, he was carried by *Burgess* into the kitchen, where he saw *Rhoda's* child, then an infant, of but a few weeks old; that he took out letters of administration on the estate of his father, *James Thomas*, in June 1817, and that he did not go to settle with *Burgess* until after he had taken out letters. And the witness, on being cross examined, stated that he

did not apply to *Burgess* to know the state of his father's accounts before the date of his letters: that he knew the state of his accounts; that his father was indebted to *Burgess* for a store account, and for the hire of a negro, and for a store; besides a balance of the rent. That the rent was not settled between him and *Burgess*; they having differed, the subject was referred, and was before arbitrators two years or more; and that he had never charged his father's estate for the rent, in any account passed by him with the Orphans court. The plaintiff then produced the letters of administration, dated June 1st, 1817. All this testimony, with the other proof set forth in the bill of exceptions, being before the jury, without objection by either party, the defendant offered to read in evidence the account passed by the witness, and the co-administratrix of his father, before the Orphans court in June, 1818, containing among other credits the following: "for cash due from said deceased to *George B. Burgess*, trustee of *Mary Burgess*, and paid by these accountants, as per account proved, and receipt allowed \$226 74:" declaring the object of the testimony then offered, to be, to contradict *Thomas Thomas*, and impeach the accuracy of his recollection in regard to the passing an account for rent, and as to the time expended in investigating the claim before arbitrators; but the court refused to permit the said accounts being laid before the jury for the purpose for which the same was offered. As to the correctness of this refusal, we fully concur in opinion with the county court, The testimony which had been offered on the cross examination, unless subsequently made competent by the production of the account for a legitimate purpose, was wholly irrelevant and immaterial to the issues in the cause. If the purpose for which the account was offered, was effectuated—if the facts which it was designed to prove were established or admitted—the evidence given on the cross examination was still left wholly irrelevant, impertinent to the issues, and every material fact proved in relation to them; and being so, no

Goodhand vs. Benton, Jr.—1834.

testimony contradictory thereof was admissible to impeach the credit of the witness, or shew the inaccuracy of his memory. For the purpose, then, for which the account was offered in evidence, we think it clearly inadmissible, and approve of its rejection as made by the county court. As authorities bearing on some of the views we have expressed in reference to the first bill of exceptions, see *Spencely, qui tam, &c. vs Dr. Willott*. 7 *East*, 108. *Odiorne vs. Winkley*. 2 *Gallis Rep.* 51. 1 *Stark. Ev.* 134. 1 *Phil. Ev.* 227. 2 *Stark. Ev.* 380, 381.

In the court's rejection of the account, they do not declare it admissible evidence for no purpose, but simply that it was inadmissible for the purpose for which it was offered. It was still open to the appellant to offer it as evidence for any other purpose, for which it was legally competent. Had the defendant have offered the account in evidence generally, without specifying his object, or had stated it to be to contradict, or discredit, the testimony of the witness given on his examination in chief, in relation to his statement of having seen *Rhoda's* child, a few weeks old in December, 1817, upon the principles settled by this court in *Davis, et al. vs. Barney*. 2 *Gill and Johns*. 382. *Davis vs. Davis, et al.* 7 *Harr. and Johns*. 36; and *Morris vs. Brickley and Caldwell*, 1 *Harr. and Gill*, 107; there could not have been a doubt as to its legal admissibility. Connecting it with the proof offered on the cross examination, it was testimony legally sufficient to have been submitted to the consideration of the jury. It did tend (in the judicial sense of the word) as used in *Davis, et al. vs. Barney*, to prove the issue, or in other words, did so contribute to prove it, as to warrant the jury, without ranging in the wide field of irrational conjectures or extravagant improbabilities, to have made it the basis of a verdict for the appellant.

The witness, on his examination in chief, had proved that in December, 1817, (after the granting of his letters of administration in the June preceding) he had called on *George B. Burgess* to settle the rent, and saw there

Rhoda's child, *Bill*, (the negro in controversy) then but a few weeks old ; and on his cross examination he deposed, that the rent was not settled between him and *Burgess* ; but that having differed as to the rent, it was referred to arbitrators, and remained before them two years or more. The account passed by the Orphans court is evidence, that the witness paid the rent anterior to the 18th of June, 1818. All the statements of the witness, therefore, cannot possibly be true. A part of the testimony elicited by the cross-examination was in direct collision with that given on the examination in chief: both could not stand together. It could not be true, that the controversy about the rent was two or more years before the arbitrators, if the reference had been made as stated by the witness. Which statement was true, the jury only was competent to decide. Should they have believed that the subject of the rent was before the arbitrators two or more years, it was within the scope of their powers to conclude that the reference, though continued afterwards, commenced in the life-time of *James Thomas* ; and that the witness was mistaken in dating his visit to *George B. Burgess'* house in December, 1817 ; that in truth it occurred in December, 1816 ; and such a conclusion is by no means irrational or improbable, when viewed as it must have been by the jury, in connection with all the evidence given in the cause. Had the jury believed that the witness had fallen into such a mistake, his testimony, instead of sustaining the plaintiff below, would have strongly supported the defendant's defence.

Concurring in opinion with the county court, on both bills of exception, we affirm the judgment.

JUDGMENT AFFIRMED.

REED'S HEIRS AND ADMINISTRATORS vs. E. F. CHAMBERS.—*E. S. June, 1834.*

Where R sold his land (which was incumbered by mortgage and judgment) to S, and entered into a written contract, binding under the statute of frauds, by which the latter promised to pay one of R's creditors, by a certain day, a subsequent parol agreement, pointing out the mode in which the title to the land should be secured to S, and in effect, carrying the contract into execution, but which postponed the day of the creditor's payment, is no variance of the original agreement; for even where the time of payment is of the essence of a contract, a strict compliance may be waived by the vendor of the land.

APPEAL from the Equity side of *Kent* county court.

The present bill was filed by the appellee against the appellants, to recover a sum of money, the proceeds of certain real estate, which, under the circumstances detailed by the judge who delivered the opinion of this court, had been paid to the clerk of *Kent* county court, and by him deposited in bank.

The county court decreed the money to the complainant, and from that decree the defendant prosecuted an appeal to this court.

The cause was argued before **STEPHEN, ARCHER, and DORSEY, Judges.**

Wm. Carmichael for the appellants.

There are a few plain legal propositions which, if recognized by this court, must decide the cause. By the statute of frauds and perjuries no parol contract is binding for the sale of land; and by the common law, and this statute, no written contract can be changed, altered, or added to, by any parol agreement. *Roberts on Frauds, 2d Am. ed., 10*, where all the authorities are collected in notes, and go to establish this proposition, and further, that the rule equally binds the courts of law, and courts of equity.

In the case of *Howard vs. Rogers, 4 Harr. and Johns. 281*, Ch. J. CHASE decided, with the concurrence of the

other judges, that parol evidence is not to be admitted, nor extrinsic circumstances introduced in the exposition of deeds, except only in the case of latent ambiguity; and in *Wesley and others vs. Thomas and others*, 6 Harr. and Johns. 24, Judge W. DORSEY declares, that “by the rule of the common law, independent of the statute of frauds and perjuries, parol testimony is inadmissible to contradict, add to, or vary the terms of a written agreement.” The written agreement between *Reed* and *Spencer* was specific, that *Spencer* should pay the *Andersons’* judgment, *Gettings’* mortgage, and pay the balance with interest in twelve months; the parol agreement, which the court below received and adopted, was different and variant, that the lands should be sold by the sheriff. The written agreement was, that the deed should be made by *Reed*; the parol agreement, that the title should be made by the sheriff. It is manifest that, at the time of the written agreement, one of the objects of *Reed* was to prevent the land being sold by the sheriff, but he agreed by parol that the sheriff should sell. Judge DORSEY adds, the principle is founded in the wisest policy: it guards the chastity of written agreements against all interpolations; but the court below sanctioned the violation of the chastity of this written agreement, which they ought to have protected. Written agreements speak their own views: parol agreements are presented by parol testimony, and subject to misconstruction, fraud, and perjury. This is the foundation of the rule at common law, adopted and sanctioned by the statute of *Charles*, and courts and judges are bound to preserve and maintain the land-marks of the law.

The appellee, by his bill and the testimony taken under the commission, seems to rest his claim upon the acts done between the parties. By a perusal of the testimony, it will appear that not a single act was done by either party in performance of the written contract; all the complainant was able to prove under the commission was the conversation held with *Reed’s* overseer, in which he promised him

some compensation for putting the wheat in good order, and that he sent a few team and some hands to assist in the operation: these were substantive, independent acts. The rule of law must be familiar to this court, where a contract is made for the sale of lands by parol, and possession delivered, the contract is binding; and where one party contractor performs his part of the contract, a court of equity will compel performance on the other; 1 *Mad'x Ch.* 302, *Ambler*, 586; but the act done must be a substantive part of the contract, not voluntary, and by which the party performing would sustain a substantial injury unless relieved in equity. 1 *Mad'x Ch.* 304.

A question may be raised whether the appellants, the defendants below, can avail themselves of the defence of the statute of frauds and perjuries without pleading it.

The rule is, that although a party to a parol contract, inhibited by the statute, confesses the contract by his answer, he may still avoid it, by pleading the statute; but if he confesses the contract, or submits to a decree for the performance, he cannot, upon hearing, avail himself of the protection of the statute. 1 *Mad'x*, 304, 6 *Vesey*, 554. The defendants below in this cause made no admission, they disclaimed all knowledge of the parol contract, and the plea of the statute of frauds and perjuries would have been superfluous.

Chambers for the appellee. The reporters have not the notes of this argument.

STEPHEN, J., delivered the opinion of the court.

The question in this case arises upon the following statement of facts: On the 18th of October, 1829, Gen. *Philip Reed* sold to *Richard Spencer* a tract of land in *Kent* county, for the sum of seven thousand dollars; which land was afterwards, on the 1st day of December, in the same year, sold by *Spencer* to the complainant. Prior to the sale from *Reed* to *Spencer*, the farm had been mortgaged to *Gettings*

for the sum of three thousand dollars; and the land was then subject to sundry liens arising from judgments against *Reed*, which, together with the mortgage, amounted to more than the purchase money. On one of those judgments an execution had been issued, and the farm levied on by the sheriff for a considerable sum of money due to *Anderson*. The contract of sale made between *Reed* and *Spencer* is in substance as follows: *Reed* sold to *Spencer* his farm for seven thousand dollars, out of which was to be paid the balance of the mortgage, and judgment at the suit of *James M. Anderson* and *Edward Anderson*; also a mortgage and debt due by *Reed* to *James Gettings*, of *Baltimore* county; and any balance which might remain due, was to be paid with interest to *Reed* at the expiration of the term of twelve months. It was further stipulated, that *Anderson's* claim was to be paid by *Spencer* on or before the 2d of December next. In a short time after this contract, to wit, on the 2d of November, 1829, for the purpose of securing the title to *Spencer*, it was agreed between *Reed*, *Spencer*, and the sheriff, that the land should be sold by the sheriff under the execution then in the sheriff's hands; and it was advertised for sale on the 2d of the following December. On the 2d of November, in the same year, *Reed* died. At the sale the complainant, who had previously bought *Spencer's* interest, became the purchaser, for a sum which, added to the mortgaged debt, amounted to seven thousand dollars. The complainant then sold his title to *Mitchell* for the sum of eight thousand five hundred dollars, with an understanding that *Mitchell* was to pay the mortgaged debt, and *Anderson's* judgment, and to pay the balance to complainant. As the most eligible mode of obtaining the title for *Mitchell*, it was agreed by all the parties interested, that *Mitchell* should be returned as the purchaser, and obtain a deed from the sheriff, for which purpose the land was again exposed to sale, and *Mitchell* bid a sum which, added to the mortgage, amounted to eight thousand five hundred dollars. The sheriff reported the sale as

made to *Mitchell* for the sum of four thousand nine hundred and thirty-nine dollars and fifty cents, and the court ordered the same to be applied to the execution under which the land was sold, and to other judgments which were liens at the time of *Reed's* sale, excepting the sum of one thousand five hundred dollars, which was paid to the clerk, and afterwards deposited in bank. The seven thousand dollars, the purchase money agreed to be paid to *Reed*, having been applied to the payment of the mortgage debt and the judgment, the question for the court to decide is, whether the complainant is entitled to the fifteen hundred dollars, the surplus money beyond the sum agreed to be paid to *Reed*, which *Mitchell* bid for the land under his contract with the complainant. There can be no question but that the contract between *Reed* and *Spencer* was legal and binding upon the parties, it being in all respects perfectly conformable to the requisitions of the statute of frauds and perjuries. The verbal agreement entered into on the 2d of November of the same year, was no variation or change of the written contract for the sale of the land, but only indicated the mode in which the title was to be secured to *Spencer* by *Reed*. It was, in effect, to carry the contract into execution, and not to add to, vary, or change it. As to the objection insisted upon in the answer, that *Spencer* forfeited his interest under the contract of purchase, by not paying the purchase money according to the terms of it, we think it wholly untenable, because the principle is well settled, that even where the time of payment is of the essence of the contract, a strict compliance at the day may be waived by the vendor. See 1 *Johns. Chan. Rep.*, 270, where the principle is stated to be, that in the sale of lands, time may make part of the essence of the contract, and on default at the day without any just excuse, or any acquiescence, or subsequent waiver by the other party, the court will not help the party in default. In this case, if the money was not paid as stipulated by the written contract, the non-payment at the time originated from the ex-

press agreement of the parties, and all the effect of such omission upon their respective rights, must be considered as waived. We therefore think that there is no error in the decree of *Kent* county court, and that the same ought to be affirmed with costs.

DECREE AFFIRMED WITH COSTS.

EDWIN A. PRATT vs. WILLIAM VANWYCK'S EX'RS.—
E. S. June, 1834.

The right of the vendor to pursue real estate remaining in the hands of the vendor, or volunteers claiming under him, or his alienees with notice, for the recovery of unpaid purchase money, exists only in equity.

This relief is afforded in equity on the ordinary ground that the claimant is remediless at law. If the vendor can, by any proceeding at law, recover his claim, chancery will not enforce his equitable lien. His remedy at law must be first exhausted, or it must be shown that none exists there, and the proof is upon him.

H being indebted to V, conveyed to him as security, by way of mortgage, a tract of land. Afterwards V assigned this mortgage to P, who gave his bonds for the sum due on the mortgage. HELD, that in the contemplation of a court of equity, the interest sold by V to P, was personal and not real estate, and that there was no implied lien for the purchase money. The thing sold was the debt; the mortgage passes as an appurtenant to the debt, and these are incapable of a separate and independent alienation.

APPEAL from the equity side of *Queen Ann's* county court.

The appellees exhibited their bill against the appellant and one *Ann Pratt*, on the 1st of May, 1826, for the purpose of charging certain lands which had descended to the appellant from his father, with a debt due the appellees' testator from *Ann Pratt*.

The bill alleged that *Francis Hall* being indebted to their testator, on the 26th of April, 1816, for the purpose of securing the payment of the same, conveyed to him, by way of mortgage, a tract of land called *Neale's Residence*. That this mortgage afterwards, on the 13th of December,

Pratt vs. Vanwyck's Ex'rs.—1834.

of the same year, was, by their testator, sold and assigned to *Ann Pratt*, she having then secured to be paid to him the balance due thereon, by certain bonds, all of which except one, have since been paid. That this bond remaining unpaid, complainants, after the death of their testator, brought suit on it against *Ann Pratt* in 1824, and recovered a judgment thereon, upon which a *fieri facias* was issued in 1825, and the real estate of the said *Ann* sold by the sheriff to the amount, deducting the expenses, of one thousand and eighty-six dollars and twenty-five cents, which was applied in part discharge of the judgment. That *Ann Pratt* afterwards, on the 17th of April, 1819, by a deed of bargain and sale, purporting to be for a valuable consideration, conveyed to her son, *Edwin W. Pratt*, the mortgaged premises so as aforesaid transferred to her by the complainant's testator. That the consideration was colourable and nominal merely, no money having in fact been paid by the grantee, and that consequently the conveyance is fraudulent and void against creditors, and more particularly with respect to the claim due their testator, which they insist is an equitable lien on the property. That even if the consideration money mentioned in the deed had been paid by the grantee, still he would have taken the property subject to their claim, as he was aware of its existence at the time of the conveyance to him. That the grantee is dead, leaving *Edwin A. Pratt*, the appellant, an infant, his heir at law, to whom the property in question has descended, and in whose hands it is liable to be sold for the payment of complainant's claim, the personal property of his father being inadequate to the payment of his debts. The bill prays a sale of the property accordingly.

The appellant, answering by his guardian, admitted the allegations of the bill in reference to the transactions between the complainant's testator, *Hall*, and *Ann Pratt*, but does not admit that the deed from the latter to his father was without consideration. He avers that *Ann Pratt*, at the time complainants recovered judgment against her, was

seized and possessed of other real estate than that which had been sold under the execution, and of value more than sufficient to pay the judgment. That, even if this were not so, he insisted that the complainants could not follow the land in his hands, after having voluntarily received the security given by *Ann Pratt*, or at all events not until they had diligently prosecuted their remedy against her, which they had not done.

The answer of *Ann Pratt* admitted the sale to her of the mortgaged premises by *Vanwyck*, as alleged in the bill, the security given by her for the purchase money, and the obtention of the judgment by his executors for the balance thereof, and the satisfaction of the same, in part, as alleged. She further admitted that the deed from her to her son, *Edwin W. Pratt*, was without a pecuniary consideration, and that he not only knew at the time that a balance of the purchase money due from her to *Vanwyck* remained unpaid, but he then and frequently afterwards promised her to pay it.

After some proof had been taken and returned, which it is not considered necessary to notice, HOPPER, A. J., on the 8th of January, 1833, decreed that the property should be sold unless the defendant, by a day limited, should pay the complainants the amount of their claims.

From this decree *Edwin A. Pratt* brought the record upon appeal to this court.

The cause was argued before MARTIN, STEPHEN, and DORSEY, J's.

Chambers for the appellant, and *William Carmichael* for the appellees.

DORSEY, J., delivered the opinion of the court.

The right of the vendor to pursue for the purchase money unpaid, real estate remaining in the hands of the vendee, or of volunteers claiming under him, or of his

alienees with notice, exists only in a court of equity. It is a relief afforded only there on the ordinary ground that the claimant is remediless in a court of law. If the vendor can, by any proceeding at law, recover the amount due him, Chancery never interferes to enable him to assert his equitable lien. His remedy at law must be first exhausted, or it must be shown that none exists there. As sustaining this doctrine, if any authority be necessary, see *Garson vs. Green and others*, 1 *Johns. Ch. R.* 308. When, therefore, a vendor goes into equity seeking to enforce such a lien, he must show that he has no redress at law. That has not been done by the present appellees: 'tis true they have alleged the seizure and sale, under an execution, of real and personal property of *Ann Pratt* to an amount exceeding \$1,000, but the issuing of such execution is nowhere proved, nor is it admitted in the appellant's answer; and if it were, it is neither alleged or proved that *Ann Pratt* had not other property, out of which the debt could have been made by execution; on the contrary, it is in proof that she had. The appellees then have wholly failed to show themselves in an attitude to ask that relief which has been extended to them by the county court. Nor is their condition improved by the proof that *Edwin W. Pratt* promised to pay the balance of the purchase money due from *Ann Pratt* to *Vanwyck*, such evidence being wholly inadmissible, because it changes and contradicts the written contract between them.

But suppose it was admissible, and that such promise was obligatory to the extent imported by its terms, it could avail the appellees nothing in their present proceeding. It created no new lien upon the land in question—it furnished a substantive cause of action at law, where redress for its violation ought to have been sought.

But there is another insuperable objection to the affirmance of this decree, upon which alone it must be reversed, if all other grounds were wanting. The interest or property sold by *Vanwyck* to *Ann Pratt* was, in contemplation

Patterson vs. Wilson.—1834.

of a court of Chancery, personal not real estate; and there is therefore no implied lien upon it for the unpaid balance of the purchase money. The mortgage debt due by *Hall*, if any thing, is, in equity, the thing sold by *Vanwyck*. The mortgaged premises pass as appurtenant to the debt; they are incapable of a separate and independent alienation.

DECREE OF THE COUNTY COURT REVERSED WITH COSTS.

JOHN PATTERSON vs. JACOB C. WILSON.—E. S. June, 1834.

An action upon the case in the nature of waste, can, upon the principles of the common law, be only maintained in the county court of the county where the trespass was committed. It is a local and not a transitory action; but if the plaintiff alleges in his declaration that the defendant has removed out of the county where the property wasted may lie, and cannot be found in such county, then, under the act of 1785, ch. 87, sec. 4, the defendant may be sued in the court of any county where he or she may be found.

APPEAL from *Caroline* county court.

This was an action on the case in the nature of waste, instituted by the appellant against the appellee, a resident of *Caroline* county, on the 4th of March, 1829, to recover damages for injuries done to the appellant's inheritance, situate in *Dorchester* county, by the appellee, the tenant thereof.

The defendant demurred specially to the declaration, upon the ground that the action was *local*, and should have been brought in *Dorchester* county.

The plaintiff then joined in demurrer, and from the *pro forma* judgment against him, he appealed to this court.

The cause was argued before **EARLE, ARCHER, and DORSEY, J's.**

Page, for the appellant, cited the acts of 1714, ch. 4; 1728, ch. 24; 1796, ch. 43; 1785, ch. 87; 1801, ch. 74,

Patterson vs. Wilson.—1834.

sec. 11. 1 *Chitty's Pl.* 270, 271. 1 *Bac. Abr.* 56, 57, 58. 4 *T. R.* 503.

Bullitt and *Lockerman*, who argued for the appellee, cited 1 *Chitty Pl.*, 270, 1, 4. 3 *Chitty Black.* 294, note 4. 1 *Bac. Abr.* 56, 7, 8. 4 *Term. R.* 503. *Acts of 1728*, ch. 24; 1714, ch. 4; 1787, ch. 87, sec's. 1, 4. 1 *Saund.* 241, b. n. 6. 1 *Wils.* 165. 6 *Bac. Abr.* 382, 385. 2 *Gill and Johns.* 374. *Cowp.* 176, 7. 1 *Strange*, 646. 6 *East.* 529. *Act of 1801*, ch. 74, sec. 11.

The opinion of the court was delivered by DORSEY, J.

The question we are called on to decide is, can a defendant, in a local action, arising in a different county, be sued in the county in which he resides. According to the common law it is admitted that he could not; the ancient requirements of that system being that the trial shall be had before a jury of the *vicinage*, who are presumed to be acquainted with the subject-matter to which the controversy relates, and therefore more competent to decide it than a jury of strangers. But it is alleged that this wholesome provision of the common law has been changed by acts of assembly to which we have been referred; and first of the act of 1728, ch. 4, which it is said is impliedly a repeal of that law; and places local actions to be commenced by *capias ad respondendum*, on the same footing with transitory actions, triable only in the county court within the jurisdiction of which the defendant resides. The act of 1728, neither in its spirit or its terms was intended to give to the county courts of the defendant's residence, jurisdiction over any subjects of litigation which they did not before possess. It enacts, "that it shall not be lawful for any person whatsoever to cause any inhabitant to be arrested out of the county where he or she doth reside, by virtue of any *capias ad respondendum* or *capias ad satisfaciendum*, for any debt, damages, or costs, until the sheriff or coroner of the county where the defendant shall reside, shall have returned a *non est inventus* on a *capias ad re-*

spondendum, or *capias ad satisfaciendum*, issued at the request of the said person against the said defendant." Not a word is contained in the law giving them any new jurisdiction; its only object was to remedy an evil, heretofore existing, which was that, in transitory actions the inhabitants of the then province of *Maryland* were arrested, as stated in the preamble to that act of assembly, "when they shall happen to be found about their necessary affairs out of the county where they reside." It designed to throw around him no additional protection from arrest where, instead of being absent about his "necessary affairs," he was committing torts upon the real estate of the inhabitants of other counties. When so employed, neither justice nor policy would sanction the raising of such a legislative shield in his behalf: no such motive can rationally be imputed to the legislature. Their only design was to withdraw from all other county courts than that in which the defendant resided, jurisdiction over transitory actions against him; and also to restrain the practice of the provincial court of issuing process to arrest an inhabitant of the State out of the county in which he resided.

That the discrimination between local and transitory actions was not destroyed by the act of 1728, is manifest from the act of 1785, ch. 87, sec. 4, entitled "an act concerning jurisdiction," which unequivocally recognizes the distinction in declaring "that if any person commits a trespass on real property, and shall remove from the shore on on which such property may lie, to the other shore, or cannot be taken on the shore on which such property may lie, such trespasser may be sued in the court of any county where he or she may be found, or in the general court of the shore in which he or she may be; and if any trespass shall be committed on any real property, and the person committing the same shall remove from the county where such property may lie, or cannot be found in such county, such trespasser may be sued in any county where he or she may be found, or in the general court at the election of

Patterson vs. Wilson.—1834.

the party injured." Now, if by the act of 1728, local and transitory actions were, as is insisted, placed on the same footing, all that is said in the act of 1785 about the locality of the real property on which the trespass was committed, is an unmeaning absurdity, the imputation of which, to one of the most enlightened legislative bodies that ever wielded the destinies of *Maryland*, would be an act of uncourteous rashness which no court of justice in this State would be guilty of, but under circumstances of much stronger necessity for its adoption than exist on the present occasion.

The same remarks are applicable to the 14th sec. of the act of 1796, ch. 43, which is simply a re-affirmation of the enacting clause before recited from the act of 1728, as was the 11th sec. of the act of 1801, ch. 43, but the re-adoption of the same enactment.

It is contended that, by the act of 1714, ch. 4, sec. 2, the power to try a local action in the county in which the defendant resides, instead of that where the cause of action accrued, is expressly given. This court have decided, that a case within the letter of a statute, but not within its spirit, is without the statute. The title of the act of 1714 is "an act for relieving the inhabitants of this province from some grievances in the prosecution of suits at law." The preamble, after reciting the ruinous condition in which many of the inhabitants of the province had been placed by "a late long and expensive war," and by heavy losses by enemies' captures, and deprivation of trade with *France* and *Spain*, declares "that very many honest and industrious planters, her Majesty's subjects here, by the very charges of necessary clothing and tools for themselves and families, are become vastly indebted, and no prospect as yet appearing of any means whereby they may extricate themselves out of their miserable and deplorable circumstances, which are very much heightened and aggravated by their being sued, and brought to *Annapolis* from the remotest parts of this province, to their manifest oppression and impoverishment, so that many of the good inhabitants of this

province daily desert their habitations, &c.” The grievance to be remedied was, that many of the planters of the province being “vastly indebted,” “were sued in the provincial court, and brought to the city of *Annapolis* from the remotest parts of this province.” It was not intended by this act of assembly to give to the county courts where the defendants resided, any new jurisdiction except that expressly provided for, but to give them exclusive jurisdiction in all those cases whereof they already had cognizance in which the debt or damages did not exceed £20 sterling or 5,000 lbs. of tobacco. The only new jurisdiction it gave to such county courts was the authority to try cases in which the real amount due did not exceed £20 sterling, but where the penalty of the bond given to secure its payment was for a much larger amount. No general jurisdiction was by this law exclusively given to the county courts. The 4th section declares that nothing therein contained should “debar or hinder any person from bringing his action in the provincial or superior court on any covenant or bond for the performance or sufferance of any act or acts, thing or things whatsoever, although the real damages or sum recovered be less than £20 sterling or 5,000 lbs. of tobacco,” provided the penalty of the bond exceeded that sum; neither did it take from the provincial court any jurisdiction which it before possessed, as in actions of detinue, replevin, waste, ejectment, &c. It cannot, therefore, upon any sound principle of construction, when not a word in the act of assembly, nor the reason on which it was founded, intimates such an intention, be said, that it was the design of the legislature to abolish all distinction between local and transitory actions, when prosecuted in the county courts, and where a recovery was had for not more than £20 sterling or 5,000 lbs. of tobacco. To give it this construction would produce this strange incongruity. Sue a defendant in the county court of his residence in an action local in its character, and the cause of which originated in another county, if the amount re-

covered do not exceed £20 sterling or 5,000 lbs. of tobacco, the proceedings are instituted before the proper tribunal, but should the verdict exceed that amount, although within the limited sum of which county courts can “hold plea or cognizance,” yet the whole proceedings are a nullity as *coram non judice*. And, further, if the plaintiff implead the defendant for the same cause of action in the county court of the county where it arose, and obtain the same verdict, the proceedings are all *coram judice*, and a judgment may be rendered upon them. But it is an unanswerable objection to the argument resting on this act of assembly, that it has long since expired, and consequently leaves the common law unaffected by its provisions.

It is also insisted that, by the aforesaid act of 1785, the right to maintain the present action is given in express terms. But a literal interpretation of this act would manifestly do violence to the intention of its framers: their object was merely to remove from the county courts those restrictions under which they had theretofore labored to convert them from tribunals of limited special jurisdiction into courts of general jurisdiction, and not to give them powers inconsistent with the principles of the general law of the land, and which the general court itself did not possess, that of taking cognizance of local actions arising without the limits of their territorial jurisdiction. In accordance with the design which we have imputed to them, the legislature, in the 1st section of said act of 1785, enact “that any person, after the end of this session of assembly, shall have full power to commence, prosecute, and carry on to final judgment, in the county court of the county where the defendant or defendants may reside, any action or suit at law whatsoever, whether the same be for recovery of any debt or damages, or of the right, or possession to, or of, any lands, tenements, or hereditaments, or of goods or chattels, by writ of replevin; and the said several and respective county courts shall have full power and authority to hear and determine all such suits and actions.”

Previously to this act of assembly the county courts had no authority to try cases where the debt or damages exceeded £100 sterling or 30,000 lbs. of tobacco, nor actions of replevin, or any suit to establish the right to, or recover the possession of any lands or tenements. To supply these and such like deficiencies of power, and for no other purpose, was this section of the act of assembly adopted. Give it a literal interpretation, and see the absurdities which follow. If the general expressions used, give the jurisdiction alleged, and on the assumption of which, this action is founded, they, in terms equally strong, give to the county court, where the defendant resides, original cognizance of an action of ejectment for lands lying in a different county: that is, if *A*, the owner of lands lying in *Alleghany* county, live in *Worcester* county, he may there be sued to try the title of those lands. Was such the intention of the General Assembly in passing this law? How are you to deliver possession of the lands, for the recovery of which a judgment may pass? How are you to locate the lands in question, to enable you to determine the true location thereof? Will you send your sheriff and surveyor from *Worcester* to *Alleghany* for that purpose? Are not surveys as necessary in actions of *trespass quare clausum fregit*, and perhaps too, in actions of waste, where locations of land are in controversy, as in those of ejectment? They are all local actions, for reasons in their nature similar; and the General Assembly no more designed an interference with the one than the other. The counsel on both sides admit, that actions of ejectment and waste are still unaffected by this act of assembly. The same latitude of construction which makes these actions, exceptions, will justify an exemption of all local actions from the operation of the law.

But the 4th section of the law silences all discussion on the subject. It interprets the 1st section in a way, that puts an end to all cavilling about it, by explicitly recognizing the doctrine, that local actions remained cognizable as theretofore in the judicial tribunals, within whose cogni-

zance the land, the parent of those actions, may lie; and only authorises *ex necessitate rei*, a departure from the principle in two cases. One of which is, that if a trespasser on real property “remove from the county where such property may lie, or cannot be found in such county, such trespasser may be sued in any county where he or she may be found, or in the general court, at the election of the party injured.” The 4th section of this act of assembly thus unequivocally explains and limits the generality of the expressions in the 1st section, and demonstrates that the legislature intended no change in the character or prosecution of local actions, but in the cases especially provided for, where, but for such provision, there would be an utter failure of justice.

It is admitted that the present is a local action, as the cause of action could not have originated in any other county, than that, in which the land was situated, whereon the waste was committed. As to the wisdom or expediency of breaking down the well known distinctions between local and transitory actions, (a theme of much discussion in the case,) it is a subject for the consideration of the General Assembly of *Maryland*, rather than one, on which this court can be called on judicially to decide. The doctrine of local and transitory actions is a part of the common law which followed our ancestors in their emigration to this State, and became a part of the law of the land; to effect any change in it, the action of the legislative power only is competent.

Had the plaintiff alleged in his declaration, that the defendant had removed out of the county where the property wasted “may lie, or cannot be found in such county,” the defendant’s demurrer would have been over-ruled, and upon proof of such allegation, the plaintiff would have been *rectus in curia*, and entitled to recover according to his merits; not having done so, the demurrer was properly sustained.

Concurring with the *pro forma* decision of the county court,

JUDGMENT AFFIRMED.

ARA SPENCE vs. JOHN P. ROBINS.—*E. S. June, 1834.*

The rules of law in relation to legacies make a distinction between such as are payable out of real, and such as are payable out of personal estate; and legacies, held to be vested and transmissible when payable out of the personal, will sink for the benefit of the heir or devisee, when charged on the real estate.

As, if a legacy is given to a legatee by words of immediate or present gift, but payable at a future period, as at the age of twenty-one, it is deemed a vested legacy; and if payable out of the personal estate will *not* lapse, though the legatee should die before the period arrives designated for its payment, but on his death will be transmitted to his personal representative; but if such a legacy be charged upon land, it will merge in the land for the benefit of the heir or devisee.

R., after devising to his wife a life-estate in his lands, further devised as follows: From and after her decease, I give the said estate to my youngest son, during his natural life; and from and immediately after his decease, the same to my said youngest son's first son, and the heirs male of his body, &c. And in case my said youngest son should die without leaving such heirs male, then to my said youngest son's daughter, &c. And in case my said youngest son should die without leaving, at the time of his death, either sons or daughters, or such issue as aforesaid of said sons or daughters, then I give and devise the said lands to my *eldest* son, and his heirs forever, on his paying my three daughters three dollars per acre for all the land lying, &c. The testator's youngest son died in infancy without issue. Upon a bill filed after the death of the youngest son, by the husband of one of the testator's daughters, for a portion of the three dollars per acre, *but in the life time of the testator's widow*, it was held that the bill was prematurely filed, and should be dismissed; that although the legacies were a charge upon the land, and became absolutely vested upon the death of the youngest son without issue, in the life-time of the daughters, still the devisee was not to pay the legacy before the land fell into his possession.

APPEAL from *Worcester* county court as a court of equity.

The appellant, on the 7th day of November, 1833, filed his bill on the equity side of *Worcester* county court, against the appellee, alleging that he, the appellant, in right of his wife, one of the daughters of *James B. Robins*, deceased, was entitled to a legacy of \$2,000 under the will of her father.

The bill charged that the testator died in October, 1826, seized and possessed of a large real estate, which he de-

vised to his wife for life, and after her death to his youngest son, an infant, during his life-time, and after his death to his first son, in special tail male in strict settlement; and if his said youngest son should die without leaving, at the time of his death, either sons or daughters, or issue of such sons or daughters, then that the said lands should pass to the appellee, (the eldest son of the testator,) his heirs and assigns, on his paying to the testator's three daughters, three dollars per acre for two thousand acres, being one-half of the estate devised. That the appellant's wife died in August, 1827, the testator's youngest son in March, 1831, in infancy, and without issue, male or female, whereby the estate vested in the appellee, charged with the payment of the aforesaid legacy, which the appellant is now entitled to have paid, notwithstanding the testator's widow, the tenant for life, is still living, and the prayer of the bill was that the appellee might be decreed to pay the appellant his proportion of the legacy, with interest, or that the land might be sold for the purpose of raising the necessary sum.

A copy of the will was exhibited with the bill, of which that portion which presented the question decided by this court, will be found in the opinion of the judge who pronounced the opinion.

The defendant demurred to this bill, and the county court passed a *pro forma* decree by consent, dismissing the bill without prejudice.

From this decree the complainant appealed to the court of Appeals.

The cause was argued before STEPHEN, ARCHER, and DORSEY, J's.

Bullet and Page for the appellant, cited

Fearne, 475, 480. 1 *Pr. Wms.* 663, 563. 3 *Akt.* 283. 2 *Durn. and East.* 143, 720. 7 *D. and East.* 589. *Fearne*, 548, 552, 550, 3, 4, 6. 3 *Pr. Wms.* 414, 132. 2 *Atk.* 616. 1 *Fonb.* 214. 1 *Ves.* 236. 1 *Bro. C. C.* 181. 1 *Pr. Wms.*

572. 1 *Ves.* 409. 3 *D. and East.* 88. 2 *Wil.* 29. *Cas. Temp. Tal.* 117. 1 *Bro. C. C.* 191, 119. 1 *Ves.* 44. 2 *Atk.* 127. 3 *Atk.* 319. 2 *Pr. Wms.* 612. *Ambl.* 575. 2 *Atk.* 507. *Pl. in Ch.* 27, 500. 1 *Pr. Wms.* 478. *Ambl.* 167, 230. 1 *Atk.* 573. 2 *Vern.* 484, 460.

Martin for the appellee, contended,

1st. That the sum of money claimed by the appellant under the will, being a charge on land (if a charge) is not such an interest as is transmissible to him; *Anna Maria*, his wife, having died before the contingency happened by the death of the youngest son of the testator without leaving issue at the time of his death.

2d. That, if the sum of money in question is transmissible to the appellant as the representative of his wife, that he is not entitled to have the same paid or raised until the death of Mrs. *Andasia Robins*, the wife of the testator, before which time the estate devised and charged as aforesaid, could not vest in the appellee *in possession*, and that the bill was premature.

3d. That although the devise of this estate to the appellee, on his paying a sum of money to the three daughters of the testator, makes a condition, it does not amount to a charge, and that therefore the decree below ought to be affirmed.

On the 1st point, cited *Ld. Tynham vs. Webb*, 2 *Vez. Sr.* 206. *Pawlet vs. Pawlet*, 1 *Vern.* 204, 321. *Yates vs. Fettyplace*, 2 *Ib.* 416. *Carter vs. Bleedsoe*, 2 *Ib.* 617. *Smith vs. Smith*, 2 *Ib.* 92. *Jennings vs. Looks*, 2 *P. Wms.* 29, 276. *Duke of Chandos vs. Ld. Talbot*, 2 *Ib.* 601, 613. *Sherman vs. Collins*, 3 *Atk.* 312. *Van vs. Clark*, 1 *Ib.* 510, *Attorney General vs. Milner*, 3 *Ib.* 112. *Hall vs. Tery*, *Ib.* 502. *King vs. Withers*, 3 *P. Wms.* 414. *Newton vs. Griffith*, 1 *Harr. and Gill*, 424, 425.

On the 2d point, *Clinton vs. Seymour*, 4 *Vez. Jr.* 440, 460. *Evelyn vs. Evelyn*, 2 *P. Wms.* 659. *Broom vs. Berkley*, 2 *Ib.* 484. *Hutchins vs. Foy*, *Comy. Rep.* 721, 725.

Spence vs. Robins.—1834.

On the 3d point, *Bac. Abr.*, *Tit. Cond.*, *Let. B.*, *Cok. Lit.* 236. (b) *sec.* 383. *Corwin vs. Ashley*, 4 *Bur.* 1929. *Willock vs. Hammond*, *Cro. Eliz.* 204.

STEPHEN, J., delivered the opinion of the court.

The question arising in this case is important and interesting to the parties, and the decision of it has been found not free from difficulty. It arises upon the construction to be given to the will of the late Judge *Robins*, in that part of it which contains the following devises and bequest. After giving to his wife a life estate in certain of his lands he devises the same in the following manner: "from and after her decease, I give and devise the said real estate and lands which I have herein before given to her during her natural life, to my youngest son during his natural life, and no longer; and from and immediately after my said youngest son's decease, I give and devise the same to my said youngest son's first son, and the heirs male of his body begotten; and in case my said son's first son should die without such issue male, as aforesaid, then I devise the same to my said son's second son, and the heirs male of his body begotten; and in case my said son's second son should die without such male issue as aforesaid, then I give and devise the same lands last mentioned to my said son's third son, and the heirs male of his body; and in case my said son's third son should die without such issue male as aforesaid, then I devise the said lands to my said son's fourth son, and his heirs male begotten forever, and so on, with like limitations as aforesaid, on the contingencies aforesaid, to my said son's fifth, sixth, or other sons. And in case my said youngest son should die without leaving such heirs male, then I give and devise the said lands last mentioned to my said youngest son's daughter or daughters, as tenants in common, if more than one, in special tail male to each daughter. And in case my said youngest son should die without leaving at the time of his death either sons or daughters, or such issue as aforesaid, of said sons or

daughters, then I give and devise the said lands to my eldest son, *John P. Robins*, and his heirs forever, on his paying my three daughters three dollars per acre for all the said lands lying on the west side of the county road, and excluding all mortgaged lands, adjoining said lands included in this devise which I may hold, it not being my intention to pass said mortgaged lands by this my will." In the discussion of this case, several questions have been raised by the solicitors for the parties, and argued with great legal learning and ability; but the most prominent and important one depends upon the character of the bequest to the daughters of the testator; that is to say, whether it was a legacy in its nature purely and absolutely contingent, or whether it vested prior to the happening of the contingency, so as to be transmissible to their representatives in case of their deaths or the deaths of either of them before the contingency happened. The decision of this question, and the principle involved it, particularly affects the complainant in this cause, whose wife departed this life before the contingency happened, upon which the contingent limitation to the testator's eldest son was to take effect, according to the provisions of the will. The rules of law in relation to legacies, make, unquestionably, a distinction between such as are payable out of real, and such as are payable out of personal estate; and legacies which they hold to be vested and transmissible, when payable out of the latter, will sink for the benefit of the heir or devisee, when charged on the real estate, as if a legacy is given to a legatee by words of immediate or present gift, but payable at a future period, as at the age of twenty-one, it is deemed a vested legacy; and if payable out of the personal estate, will not lapse though the legatee should die before the period arrives designated for the payment of it, but on his death will be transmissible to the personal representative; but if such legacy be charged upon land, it will merge in the land for the benefit of the heir or devisee. This is the general rule, and it is applied in all cases where the time of pay-

Spence vs. Robins.—1834.

ment is postponed on account of considerations having a personal reference to the legatee, unless it is controlled by some express provision of the will, or the manifest intention of the testator to the contrary, as where the legacy is payable at twenty-one or marriage, then if the legatee die before the age of maturity or marriage, the legacy sinks in the land, and will not be raised; for, in the language of the books, the law will not load or burthen the heir or devisee for the benefit of the executor. But the principle seems to be equally well established, particularly by the more modern authorities, that wherever it is apparent that the gift was not made immediate, but that the time of payment was postponed for the convenience of the estate, and not from considerations of a personal nature applicable to the legatee, the legacy shall not lapse, though the legatee should die before the contingency happens, upon the occurrence of which it is made payable. In such case it does not seem to be necessary, where the legacy is charged upon the land, that there should be express words of immediate gift to constitute the legacy so far vested as to make it transmissible; but that the legatee may acquire, without them, such an interest in the legacy as will go to the personal representative, and prevent its merger. It is true that, in many of the cases to be found in the books, the legacies have been charged upon vested remainders, and it has been said that the remainder being vested, the legacies charged upon them shall be deemed vested likewise: as, where an estate has been limited to *A* for life, remainder to *B*, and a legacy has been charged upon the remainder limited to *B*, there the legacy will be held to be vested, because the remainder upon which it is charged is vested. But it does not appear to be necessary that the legacy should absolutely vest in order to become transmissible in case of the death of the legatee before the contingency happens, upon which it is made payable. 2 *Fearne on Remainders*, 531, 532. The case of *King vs. Withers*, establishes the same principle, because the event upon which the additional

legacy was given to the daughter might never have happened, and yet the *Ld. Chancellor* determined, that it so far vested as to be transmissible upon the death of the daughter, before the contingency happened. *Cas. Temp. Talb.* 117. This is a case strikingly analogous to the present, and was strongly pressed upon the argument as decisive of the question in this case. That it establishes the principle that a possibility is transmissible, was the opinion of *Ld. Kenyon*, as may be seen in the opinion delivered by him in 3*d* *Term. R.* 94. In that case he quotes a decision, *C. J. WILLE*, where he says, “the question is, whether an executory devise be transmissible? Most of the old cases which hold that they are not devisable, were before executory devises were well established. But that doctrine is now exploded. Executory devises are not naked possibilities, but are in the nature of contingent remainders; and there is no doubt but that such estates are transmissible, and consequently devisable.” *Ld. Kenyon* then uses the following language: “here then the chief justice gave a clear opinion that a possibility was devisable. That it is also transmissible, appears from the cases of *King vs. Withers*, and *Marks vs. Marks*, as establishing the same principle. It is also referred to in 2 *Fearn*, 531.” In the same volume, 529, in treating of the qualities incident to executory devises, he says: “There still remains another property of executory devises to be taken notice of, which belongs to them in common with contingent remainders: what I mean is, that an executory interest, whether in real or personal estate, is transmissible to the representative of the devisee, when such devisee dies before the contingency happens; and if not before disposed of, will vest in such representative when the contingency happens.” As proving and illustrating this principle, he then refers to the cases of *Pinbury vs. Elkin*, and *King vs. Withers*. So in 1 *Wms. on Ex’rs.* 576, a very recent work, and one of established reputation, the case of *King vs. Withers* is also referred to as establishing the same principle. *Wil-*

iams, in noticing the case of *King vs. Withers*, holds the following language: "In *King vs. Withers*, *Ld. Talbot* decreed that the legacy should be raised for the benefit of the administrator (the husband) of the daughter; and he held that though it did not absolutely vest, because it might never arise, yet it so far vested as to be transmissible to the representative. This decree was afterwards affirmed in the House of Lords." The case of *King vs. Withers*, as reported in 3 *P. Wms.* 414, contains the following facts: "*Charles Withers*, the father, was seized of a real estate of £900 per annum, and possessed of a great personal estate; and by his will, dated the 3d of June, 1697, duly executed, gave to his daughter, *Henrietta Maria*, £2,500 at her age of twenty-one, or marriage, which should first happen; declaring his intention and meaning to be, that if his son, *Charles Withers*, should die without issue male of his body then living, or which afterwards should be born, then his said daughter should have and receive at her age of twenty-one or marriage, which should first happen, £3,500 over and above the said £2,500. After which he entailed his real estate on the heirs of his body, with remainder to his brother, *Andrew Withers*, in fee; and directed, that in case the said contingency of his son's dying without issue male, should not happen before his daughter's age of twenty-one or marriage, then she should receive and be paid the said £3,500 whenever it might after happen; and made his wife, *Dorothy*, his brother, *Andrew Withers*, and one *John White* executors. Declaring further, that his land before mentioned in his will, should be liable and chargeable with the payment of this £3,500 whenever it might become due or payable." It is observed that in this case the legacy of £2,500 was given to the daughter at the age of twenty-one or marriage, it of course did not vest until the daughter arrived at the specified age or married. The additional legacy of £3,500 she was to have at the same period: it likewise never vested until one or other of the events of marriage or maturity occurred;

for until then she had no right or capacity to take the legacy; if she had died before either event happened, her personal representative would not have been entitled to the legacy. See 2 *Williams on Executors*, 767, where he says, "if the words payable, or to be paid, are omitted, and the legacies are given at twenty-one; or if, in case of, when, or provided, the legatees attain twenty-one, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment, consequently if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy. In the case, therefore, of *King vs. Withers*, there were two contingencies, and the daughter was not entitled to receive the legacy unless both had happened. She had no capacity to take until she married or attained the age of twenty-one. In the case now before this court, the capacity to take existed whenever the contingency happened. No event or contingency was mentioned, upon the happening of which such capacity depended. Whenever the youngest son died without leaving issue, as mentioned in the will, she had a right to demand and receive the legacy.

It is true, in the case before this court, there are no words of immediate gift to the daughter, nor were there in the case of *King vs. Withers*, as the case has been reported in *P. Wms.*, in reference to the additional legacy of £3,500. The reporter says, *Charles Withers* gave to his daughter, *Henrietta Maria*, £2,500 at her age of twenty-one or marriage, which should first happen, declaring his intention and meaning to be, that if his son, *Charles Withers*, should die without issue male of his body then living, or which afterwards should be born, then his said daughter should *have and receive*, at her age of twenty-one or marriage, which should first happen, £3,500 over and above the said £2,500." The will of judge *Robins* provides, that if his youngest son should die without leaving, at the time of his

death, certain specified issue, then the lands should go to his oldest son and his heirs, on his paying to his three daughters the legacy directed by the will. The fair import of the will seems to be, that upon the lands passing to *John P. Robins*, according to the limitations contained in the will, the daughters would be entitled to have and receive from him the legacies as specified, so soon as that event should occur by the failure of issue as stated. That is to say, the legacies would then become absolutely vested, and that upon the death of the testator, they acquired such an inchoate right or interest as was transmissible to their representatives, and would not merge in the land in case of their death before the contingency happened. *Fonblanque* 488, speaking upon the subject of legacies charged upon land, says: "Courts of equity, looking for the intent of the parties, are naturally influenced by a variety of prudential considerations, which cannot be brought within the range of any general rule. Where the time of payment is prescribed in reference to the person, the rule of the civil law, *causa data non secuten*, may be reasonably applied; but when the time of payment is postponed from the circumstances, not of the person, but of the fund, that rule cannot be applied without putting the general intent of the testator at hazard. To ascertain the real motive may be difficult; but whenever it can be ascertained that the time of payment was not made immediate, because it might overcharge the estate, it should seem to be too much to contend that the heir or devisee should have the further advantage of the possibility of the legatee's dying before the time of payment." In support of these principles he refers to a number of authorities, and among the number to the case of *King vs. Withers*. The devise of the land being to *John P. Robins*, on his paying the legacies, it seems to be clear that the testator intended to make them a charge on the land. To constitute such a charge, it is sufficient that lands are devised after payment of debts and legacies, or where lands are devised, debts and legacies

Spence vs. Robins.—1834.

being first or previously paid. See 2 *Johns. Ch. Rep.* 623 But although the legacies are a charge upon the land, and would become absolutely vested upon the death of the youngest son, without leaving issue, as stated in the will, in the life-time of the daughters, yet there is nothing in the will which indicates the intention of the testator, that the devisee should be forced to pay the legacies before the land falls into his possession, and considering the amount of the legacies, to force a sale of the property pending the continuance of the life estates, would produce a loss of interest to which the devisee ought not to be subjected in the absence of such an intention expressly declared by the testator, or fairly to be inferred from the circumstances of the case. And it appears that in *England*, in the case of portions, the courts of equity are not disposed or inclined to sell reversionary interests for the purpose of raising them, where any other construction can reasonably be adopted. 1 *P. Wms.* 448, 709. 2 *P. Wms. Rep.* 24. *Fonb.* 487.

The bill, therefore, in this case has been prematurely filed, and ought to be dismissed.

BILL DISMISSED WITH COSTS.

ERRATA.

In the case of *Sasscer vs. Young and Kemp*, page 247, after the 11th line, second paragraph, add, "If indeed the case was prior to the act of 1813, ch. 165."

In the case of the *State of Maryland vs. the Bank of Maryland*, page 225, in the third line, after the words 1650, ch. 28, introduce words, "they also revived the act of 1650, ch. 23."

INDEX.

ACTION—RIGHT OF.

No action will lie to recover compensation for services performed, where with a view to a voluntary legacy, the services were rendered by the plaintiff without any expectation of being paid the value thereof, or any promise of remuneration, expressed or implied. *Lee vs. Lee and Welch*, - - - - - 309

ACTION UPON THE CASE.

Where the slave of the plaintiff was carried on board a steam boat of the defendant, an incorporated company, and the captain of the boat, on the eve of its departure, informed of the slave being on board, told the plaintiff's agent to search for her, but made no search for her himself, and the slave was in fact carried off in the boat, and lost to the plaintiff; the court would not permit the jury to consider whether the agents of the defendant were guilty of misconduct or negligence in permitting the escape of the negro, and HELD, that it was the duty of the master of the boat to have made such a search as would have prevented the escape of the slave, and not doing this, the owners of the boat were responsible.

Steam Navigation Company vs. Hungerford, - - - - - 291

See Evidence, 14.
— Jurisdiction, 2.

ACTS OF ASSEMBLY

1. Where an act of the legislature limiting an estate in real property is inconsistent with the estate granted in a deed, it cannot be relied upon as curing a mere informality in its execution, but must be held to create a new estate. *Dulany and Wife and Dangerfield vs. Tilghman*, - - - - - 461
- Act of 1650, ch. 28, (Lord Proprietor's Rights,) - - - - - 205

- Act of 1785, ch. 72, sec. 12, (Sale of Infant's lands in Equity,) - 111
- Act of 1785, ch. 72, (Sale of Lands for payment of debts,) - - 424
- Act of 1785, ch. 87, sec. 4, (Jurisdiction of County Courts in local actions,) 499
- Act of 1791, ch. 68, sec. 4, (Small Debts,) - - - - - 309
- Act of 1795, ch. 18, (Sale of Lands for payment of debts,) - - 424
- Act of 1795, ch. 56, sec. 1, (Attachment,) - - - - - 335
- Act of 1797, ch. 87, (Challenging Jurors,) - - - - - 447
- Act of 1812, ch. 77, sec. 1, (Transfers by Insolvent Debtors,) - - 205
- Act of 1812, ch. 77, (Insolvent Debtor,) - - - - - 323
- Act of 1816, ch. 221, sec. 6, (Transfers by Insolvent Debtors,) - 205
- Act of 1816, ch. 221, (Insolvent Debtor,) - - - - - 323
- Act of 1818, ch. 177, (Insolvent Banks,) - - - - - 363
- Act of 1820, ch. 191, (Sale of Lands not devisable,) - - - - - 49
- Act of 1824, ch. 196, (Removal of causes from County Courts to Chancery Court,) - - - - - 16
- Act of 1824, ch. 199, (Insolvent Banks,) - - - - - 363
- Act of 1825, ch. 103, (*Hab. fac. pos.*) - - - - - 76
- Act of 1825, ch. 117, (Exceptions to Auditor's Reports,) - - - 122
- Act of 1825, ch. 114, (Attachment,) 335
- Act of 1832, ch. 302, sec. 6, (Practice upon appeal in Equity causes.) 1, 111, 122, 152, 171
- See Constitutional Law.

APPEAL.

1. Under the act of 1832, ch. 302, sec. 6, where the appellate court perceives, that the substantial merits of the cause would not be determined either by affirming or reversing the Chancellor's decree, but that the purposes of justice would be ad-

- vanced by further proceedings being had, the cause must be remanded to the Court of Chancery. *Kent's Adm'r and Boyle vs. Taneyhill*, 1
2. A trustee of a Court of Chancery may appeal to this court on behalf of those interested in the funds in his hands, from an order of the Chancery court affecting them. *E. T. and A. Ellicott vs. T. Ellicott*, 35
 3. When a decree or order is reversed upon appeal, it is the duty of this court to pass such a decree as ought to have been passed by the Chancery court. - - - - - *Ib.*
 4. H by his will dated in October, 1831, devised 4-9ths of his real estate to W, her heirs and assigns: 4-9ths to be equally divided among the children of W, their heirs and assigns, and in case either of the said children should die under age and without issue, his share to survive to the survivor; and the remaining 9th to the children of J, their heirs and assigns, to be equally divided amongst them, with a similar provision as to survivorship, as in the case of the children of W. A bill was filed by M, against the children of W and J, several of whom were minors, praying that the devised lands may be sold, on the ground that they are not susceptible of advantageous division among the devisees, and that they would be benefited by a sale and division of the proceeds. The Chancellor dismissed the bill, upon appeal it was held, that in the absence of proof that a sale and division of the land would benefit the minors, the Chancellor acted correctly; but this court believing, inasmuch as the answers consented to the sale, that the substantial merits of the case would not be determined by affirming the decree, remanded the cause to the Chancellor, for further proceedings under the act of 1832. *Harris vs. Harris*, - - - - - 111
 5. A bill against husband and wife, the wife never having answered, upon appeal the cause remanded under the act of 1832, ch. 302. *Lyles vs. Hatton*, - - - - - 122
 6. Error in calculation of interest in auditor's report since the act of 1825, ought to be pointed out by exception, else not noticed upon appeal. - - - - - *Ib.*
 7. Where a cause was set down for hearing on bill and answer, and the Chancellor dismissed the bill on the ground, that the answer was a plea of disclaimer of all interest in the defendants in the property in controversy, this court reversing the decree remanded the cause for further proceedings. *Bently vs. Cowman*, 152
 8. Since the act of 1832, ch. 302, this court is prohibited from reversing or affirming any decree of a court of equity, on the ground that the complainant has not in his bill by proper averments, shown himself entitled to the relief which has been granted, unless such defect was presented by an exception to the consideration of the court below, but still, when neither the pleadings nor proofs show that the complainant is entitled to the relief extended to him, this court may reverse the decree. *Evans et al. vs. Iglehart et al.* - - - - - 171
 9. Under the act of 1832, ch. 302, for want of proper parties, a cause is remanded to Chancery. - - - *Ib.*
 10. However it may be proper as a general rule, that this court shall adopt the language of a motion for instruction as preferred by counsel, yet if this court can perceive that full and substantial justice has been done to the party, by declaring the law accurately, and in terms explicit and intelligible to the jury, upon the points raised by counsel, it is no ground for reversing the opinion, that such instructions were not given in the words of the motion or prayer. *Hall vs. Hall et al.* 386
- See Court of Chancery, 7.
- ASSETS.
- See Executor and Administrator, 7, 8, 9.
- ASSIGNMENT--ASSIGNOR--ASSIGNEE.
1. B sold C certain oxen, and received on account of that sale an assignment of a single bill executed by M to C. B brought suit against M on the single bill to the next succeeding term of the court, and obtained a judgment in regular course by confession, with a stay of execution for thirty days. He afterwards sued out a *ca sa* which was returned *cepi* and entertained, not called by consent of the parties.—HELD, that if M had been notoriously insolvent at the time of the assignment, or had become so before the first term of the court after the assignment, there would have been no obligation on

- the assignee B to have sued him ; and that if M was insolvent at the time of the rendition of the judgment, and no loss had arisen from the stay or entering the execution not called by consent, no *laches* could be imputed to the assignee of the single bill. *Crawford vs. Berry*, - - - - - 63
2. The bonds of G, payable in 1823-4 and 5, were assigned by A, the obligee, to H, who assigned them on the 2d May, 1820, to L, in the following terms: "For value received I assign to L, his heirs and assigns, the within bond, and hold myself answerable for the ultimate payment." These bonds were afterwards assigned by L to R. **Held**, that in the event of L's diligent prosecution against those who stood before H, in the order of liability, upon those bonds, or by shewing the inutility of such a prosecution, he became entitled to a right of action against H, upon his contract of indemnity, and that suit might be brought against him for the use of R, the equitable assignee of L. But *quere*, although it was indispensable to proceed against G, the obligor, or account for not doing it, whether it was necessary to proceed against *all* the antecedent parties to H. *Lewis vs. Hoblitzell's Adm'r*, 259

ATTACHMENT.

1. J & W as creditors of M, a non-resident, sued out of the county court an attachment against the goods, chattels, and credits of M, which was laid in the hands of B, who appeared, pleaded *non-assumpsit* by M, and *nulla bona* as to himself. At the trial of the issues upon those pleas, it appeared in proof, that J and W were citizens of *Maryland*, but because the affidavit on which the attachment issued, did not state that both the plaintiffs were citizens of the State of *Maryland*, nor of the *United States*, nor residents therein, **IT WAS HELD**, that the plaintiff could not recover. *Wever vs. Baltzell and Davidson*, 335
2. Under the act of 1795, ch. 56, sec. 1, to warrant the issuing of an attachment, the affidavit of the plaintiff must state that he is a citizen of this State, or of some other of the *United States*. - - - - - *Ib.*
3. Under the act of 1825, ch. 114, the jurisdiction of the courts, upon the

subject of attachments to compel appearances, is extended to any inhabitant or inhabitants, resident or residents of any part of the *United States*, whether of one of the States, or of the *District of Columbia*, or other territories, and who by the existing laws of this State, may be entitled to sue out mesne process ; therefore to give jurisdiction, the plaintiff must be brought by his affidavit within the class of persons described in this act. - - - *Ib.*

4. Under our attachment law, our courts exercise a limited jurisdiction, and their right to exercise it depends upon the conformity of the original proceedings with the acts of the legislature ; advantage of the want of jurisdiction may be taken by the garnishee at the trial. - *Ib.*
5. The objection, that the affidavit, upon which an attachment issued to compel an appearance, did not give the court jurisdiction, may be taken advantage of at any time, and may be either upon a motion to quash before or after plea pleaded, by demurrer, by a prayer for an instruction from the court after swearing the jury—after verdict on a motion in arrest—after judgment, (without raising the objection below,) upon appeal or writ of error, assigning the want of jurisdiction as error in the appellate court. *Bruce and Fisher vs. Cook*, - - - - - 345
6. Where there is a defect of jurisdiction patent upon the record, a motion to quash an attachment may be granted, though the reason assigned for the motion be erroneous. - *Ib.* See Sheriff, 1 and 2.

AUDIT AND AUDITOR.

See Court of Chancery, 9 to 14, 18, 19.
See Appeal, 6.

BANKS.

1. The banking corporations of the State have the right to provide for the payment of their debts, by a transfer of all their property in trust. *Union Bank of Tennessee vs. Ellicott, Morris and Gill*, - - - - - 363
2. The Bank of Maryland being in failing circumstances, executed an assignment of all her property to a trustee, his heirs and assigns, for the purpose of collecting claims, and paying debts. The deed contained a clause declaring that the trustee, "his heirs and assigns, shall in such manner as he shall deem best for

the creditors of the said bank, and acting in that particular as well as in the entire execution of this trust, under the advice of A. and D., or under the advice and direction of such other person or persons as they may name for the purpose, proceed to collect,"

&c. The trustee accepted the trust, and entered upon its execution; shortly after this, at the request of various creditors of the bank, as also of its President and Directors, and under the advice and sanction of the persons substituted in the stead of A and D, as advisers of said trust, in virtue of the clause aforesaid, the said trustee agreed to associate with himself two other trustees for the purpose of the better execution of said trusts, and thereupon the said President and Directors and trustee, executed another deed to the said first trustee, and the two other trustees, agreed upon as aforesaid—HELD, that the last deed was valid and effectual for the purposes therein expressed. *Ib.*

3. Under the act of 1818, ch. 177, and 1824, ch. 199, the debtors of the banking corporations of the State, have the right to pay their debts in the notes, and certificates of deposit, issued by such corporations, without reference to the period of time when such notes and certificates were acquired by such debtors. - - - - - *Ib.*

4. The assignees and trustees of an insolvent bank, authorized to collect its debts and pay its creditors, are bound under those laws to receive payment in such notes and certificates. - - - - - *Ib.*

See Corporation.

BOND.

1. A signature and seal attached to a blank piece of paper, for the purpose of having a bond thereafter written upon it, will not bind the party as an obligor in such bond: but if a party so signing and sealing, after the bond is filled up, adopts it as his bond, it is sufficient. *Byers vs. Mc-Lanahan, Jr.* - - - - - 250
2. Such adoption is a question of fact, to be collected from circumstances; and a subsequent acknowledgment of the signature as his hand writing, to a party making the inquiry, without any intimation that he did not consider himself bound by the bond, would be sufficient proof of such adoption. - - - - - *Ib.*
3. Delivery is essential to the legal

validity of a deed; but such delivery may be either actual or verbal. It is sufficient that there be an intention, or assent of the mind to treat it as a deed, to clothe it with the attributes of a legal instrument. *Ib.*

See Assignee, 1.

— Executor and Administrator, No. 5, in relation to bond for payment of debts and legacies.

— Replevin.

— Small debts.

CASE STATED.

1. In a case stated, the parties ought to agree upon and state the facts, and not the evidence of the facts; if all the facts upon which the law is claimed cannot be agreed, a jury should be called. *Lewis vs. Hoblitzell,* - - - - - 259

CONDITIONAL SALE.

See Mortgage.

CONSTITUTIONAL LAW.

1. The legislature has the power to confirm conveyances defectively executed; and acts for that purpose must be carried into effect. The intention of the legislature to confirm a deed must be collected from the nature of the application made to them, and the terms they have used in granting the confirmation. *Dulany and wife and Dangerfield vs. Tilghman,* - - - - - 461
2. It is competent for the legislature upon the request of parties, owners of real property, to limit and vest their estates as they desire, or as they could do by deed. - - - *Ib.*

CONSTRUCTION.

The law construes no act to be tortious but from necessity. *Burke vs. Negro Joe,* - - - - - 136

See Will and Testament.

CONTRACT.

1. Upon a contract to deliver merchandise at a future day, if the day mentioned be in fact on Sunday, in analogy to the usage in other commercial cases, the day of delivery, according to the legal effect of the contract, is Saturday. *Kilgour vs. Miles and Goldsmith,* - - - 268
2. When contracts are rescinded, the parties must be restored to their former rights, and placed in the same situation in which they stood anterior to the contract. *Griffith vs. Frederick County Bank,* - 424

3. When R sold his land (which was incumbered by mortgage and judgment) to S, and entered into a written contract, binding under the statute of frauds, by which the latter promised to pay one of R's creditors, by a certain day, a subsequent parol agreement, pointing out the mode in which the title to the land should be secured to S, and in effect, carrying the contract into execution, but which postponed the day of the creditor's payment, is no variance of the original agreement; for even where the time of payment is of the essence of a contract, a strict compliance may be waived by the vendor of the land. *Reed's Heirs and Adm'rs vs. Chambers*, - - 491
See Court of Chancery, 24.
— Fraud, 1.

CONTRIBUTION.

See Surety.

CORPORATION.

1. A transfer of its property by an insolvent corporation for the purpose of paying its debts, being made *bona fide*, is for a valuable consideration and valid. *State vs. Bank of Maryland*, - - - 205
2. A corporation is not a person capable of taking the benefit of the insolvent laws of this State. - *Ib.*
3. A banking corporation although it may by a transfer of all its property render itself powerless to discharge the ordinary purposes of its institution, yet still remains a living and existing corporation. *State vs. Bank of Maryland*, - - - 205
See Banks.
— Court of Chancery, 21.
— Priority in payment of debts.

COURT OF CHANCERY.

1. The heir has the same uncontrolled discretion in resisting the payment of claims advanced against the realty, that the executor or administrator has in regard to the personality. *Collison and Owens*, - - 4
2. Estoppels are not favored in equity. *Ib.*
3. A decree to sell real estate, and distribute the proceeds among the heirs of a deceased person, is no bar to a claim of a creditor of the deceased, seeking to enforce payment of his claim out of the real assets or their proceeds. The rights of the creditor were not in issue, considered or decided, by the decree for sale and distribution. - - *Ib.*

4. Distinction between the rights of mortgagor and mortgagee, seeking to redeem or foreclose a mortgage infected with usury. *Trumbo Ex. of Neff vs. Blizzard and Jacobs*, 18
5. Upon a bill filed by complainants in the character and capacity of infants, claiming the equitable interposition of Chancery in their behalf, the fact of infancy is a material allegation, and should be sustained by proof, if not admitted by the answers. *Boyd et al. vs. Boyd*, 25
6. Where a testator devised as follows, viz. "\$10,000, of which you (the devisee) are already in possession of the greatest part, is to be at your disposition, and for your use, free of interest, during your natural lifetime; but after your death to be invested in bank stock, in the name of, and on account jointly and equally of the children of J;" and the residuary legatees, infants, filed a bill to invest the fund immediately; a charge that the fund was in danger in the hands of the legatee for life, was held to be indispensable under the circumstances of the case, to warrant the court in placing the fund in a different situation from that directed by the testator. - - - *Ib.*
7. A defendant in Chancery was returned summoned, and did not answer: an interlocutory decree was passed against him, and an *ex parte* commission issued, under which some evidence was returned. The cause was then put down for final hearing, and the bill dismissed by the Chancellor. Upon appeal, it appearing that the defendant had a sum in his hands which the complainants were entitled to have invested for their use, this court reversed the decree of the Chancellor, and remanded the cause, with liberty to amend proceedings, and produce further proofs. - - - *Ib.*
8. When the estate of a deceased person sold for the payment of debts is insolvent, his creditors must be paid interest on their debts up to the day of its sale. *E. T. & A. Ellicott vs. Thomas Ellicott*, - - 35
9. The mode of auditing accounts in such cases, is to calculate interest on claims against the deceased up to the day of sale, from which time the claimants, on the amounts ascertained to be due them by the audit, become as it were creditors of the funds arising from the sale, and

- entitled respectively to their proportions of the interest it may bear. *Ib.*
10. If the sale be for cash, no interest is received by the creditor; if on a credit (and consequently carrying interest) should a creditor be paid, as using due diligence he would be, on the day of the receipt of the money by the trustee, they would receive not only simple interest on their debts from their maturity, but interest compounded from the day of sale. - - - - - *Ib.*
 11. Where the creditor in equity causes his debtor's property to be sold for cash to the full amount of principal and interest, the debtor is absolved from all further liability. *Ib.*
 12. The same principles which regulate the rights of creditors in sales simply for cash, or on a credit, are applied in mixed sales, which are in part for cash, and in part for credit. *Ib.*
 13. The cash portion of the proceeds of sale, or money first received, or so much thereof as may be necessary for that purpose, is first applied to the payment of the costs of the suit, the commission and expenses attending the sale, and the debts; the residue is the property of the debtor. - - - - - *Ib.*
 14. If the cash portion of the proceeds of sale, applicable to the payment of debts, be inadequate for that purpose, the portion of the debts unsatisfied thereby (and no more) will bear the same interest which the credit part of the sales bear. - *Ib.*
 15. A trustee appointed by the court of Chancery to sell property in pursuance of a decree, in his character as such, may for the benefit of those interested in the funds in his hands, and who are aggrieved by an erroneous order for its payment or distribution, appeal to this court for redress. - - - - - *Ib.*
 16. Before a trustee can be deprived of his ordinary allowance for commissions and expenses accruing under the execution of the trust confided to him, he must be notified of the charge against him, and afforded an opportunity of showing his innocence; he cannot be deprived of those allowances by the mere order of the court of Chancery, requiring him to pay them over to creditors where no complaint has been filed against him as trustee, or upon the presumption that he is responsible for interest upon money in his hands. *Ib.*
 17. Where a decree or order is reversed upon appeal, it is the duty of this court to pass such a decree as ought to have been passed by the Chancery court. - - - - - *Ib.*
 18. In a mixed sale, part for cash and part on credit, where the trustee has paid one creditor too great a proportion of the cash, it may be corrected by subrogating the trustee to the rights of the satisfied creditor, as to the excess, upon the other part of the proceeds, for the benefit of the unsatisfied creditors only. The trustees personally can derive no benefit from such a substitution, and the like principle shall prevail under the same circumstances, as to excessive payments made out of the credit portion of the sales. - *Ib.*
 19. Where a mortgagor is under no obligation to come in under a bill for the sale of a deceased person's real estate for the payment of debts, but may cling to the property specifically pledged for the payment of his debt, the court will not cast the interest in such a case accruing after the day of sale upon the other creditors, but upon the heirs of the mortgagor, but will allow the mortgagee his full claim, principal and interest, out of the purchase money, and allow the trustee a credit accordingly for payments to such mortgagee. *Ib.*
 20. The real estate of W not admitting of division, was sold by commissioners under the act of 1820, ch. 191. One of the heirs of law became the purchaser, and not paying his bond for the purchase money, was sued by another of the heirs, who obtained judgment at law and sold the land. A third heir who had not been paid, now filed his bill to enforce the lien for his portion of the proceeds, under the act of 1820. This bill was against the purchaser alone.—*Held*, that the court had jurisdiction to enforce this lien; that the bond given under the act of 1820, need not be sued upon; that all the heirs of W were interested, and should be made parties; and to make proper parties the cause must be remanded to Chancery. *Ridgely vs. Iglehart*, - - 49
 21. Mortgage considered in equity as mere security. *Jamieson vs. Bruce*, 72
 22. A bill alleged that C and others were stockholders in the *Union Bank of Maryland*, and that by its charter regulating the right to vote for di-

rectors, a certain standard of voting was prescribed, fixing *sixty* votes as the *maximum* to which any single proprietor of stock could be entitled, and that no share should confer the right of suffrage which should not have been holden four calendar months previous to the day of election; that P and E large proprietors of stock, with the fraudulent intent of evading the provisions of the charter, in that respect, and for the purpose of increasing their number of votes, caused a number of shares to be transferred to *divers unknown persons* without consideration, and colorably, taking from the transferees powers of attorney, securing to them P and E all control over said stock, and the right to vote the same at their discretion; that this was a fraud upon the charter, and complainants as stockholders, of which P and E designed to avail themselves at the coming election. The bill prayed an injunction against P and E, the President, Directors, and officers of the bank, and the judges of its election, and for *sub-pœna* against P and E, T E president of the bank, R M cashier thereof, five of the directors by name, three of the clerks of the bank, and the judges of the election when appointed. Upon this bill it was held.

1. That the matter of the bill furnished sufficient ground for the interposition of a court of equity.

2. That the facts stated are a violation of the principles and spirit of the charter, and if carried into effect would be a practical fraud upon the complainants, and in derogation of their chartered rights, for which an injunction was the appropriate remedy.

3. That the relief granted by the injunction was a proper remedy.

4. That the objection for the want of proper parties, and to the injunction, having issued against persons unknown, is not sustainable. *Campbell and Voss vs. Poultney, Ellicott, & Co.* - - - - - 94

23. It is a principle well established in equity, that he who goes into equity to be relieved against his usurious contract, must in his bill tender or offer to pay the principal and interest legally due, and confine his claim to the equitable interposition of the court to the usurious excess only. *Jordan vs. Trumbo,*

103

24. A mere forbearance to sue a principal debtor does not discharge a security, - - - - - *Ib.*

25. M filed his bill against the administrator, widow, and heir at law, of J, for the sale of real estate, sold by M to J, upon which a balance of the purchase money was due. The bill charged that the number of acres in the tract was not ascertained at the time of the sale, but it was agreed to estimate the quantity at 300 acres; that a survey should be made; and any excess should be paid for at the price per acre agreed for the 300 acres. The vendor executed a bond of conveyance, and the vendee gave his bond for the purchase money. After a receipt of a part of the purchase money the vendor assigned his bond to B for value. A survey was then made, and the excess above the 300 acres ascertained. HELD, that as B, the assignee of M, might have a lien for the unpaid balance of his bond, he was a necessary party to the bill.

2d. That as to the excess above 300 acres, the complainant had a lien for the purchase money, and could recover it by a sale of the land, unless the administrator has assets to pay him.

3d. That parol evidence is admissible to establish an independent contract in relation to the excess above 300 acres, if the bonds are silent upon that subject.

4th. That the bill should be so amended as to charge assets in the hands of the administrator, the prayer being, either for a decree against him, or in case of his failure to pay, that the land might be sold. *Hall vs. Maccubbin,* - - - 107

26. The Chancellor is not authorised to decree a sale of an infant's interest in land, on the ground that it would be for his benefit, unless upon proof of that fact, of which neither the infant's answer, nor the answer of adult defendants confessing the fact, is evidence to charge the infant. *Harris vs. Harrss,* - 111

27. Under the 12th section of the act of 1785, chapter 72, the circumstance, that certain infant defendants are entitled to executory devises in land sought to be sold as not susceptible of division, presents no obstacle to a decree for a sale. The Chancellor has full power to carry into effect the intention of the testator, by making such disposition or investment of that portion of the

- proceeds of sale affected by the executory devises, as will preserve its subjection to the contingencies imposed on it by the will. - - *Ib.*
28. O devised certain lands to his son W, and his heirs, upon condition that he and they, or the person or persons to whom the estate devised may eventually pass "maintain my daughter R, or pay £60 current money a year, for her maintenance during her natural life." W having failed either to maintain R, who was an idiot, or to pay the £60 during his life, his real estate including that devised, was sold upon the application of creditors, by the court of Chancery for the payment of his debts. In the distribution of the proceeds of sale, a large sum was found due to R for arrearages of principle, and interest of the £60 legacy. C, who had maintained R for many years and until her death, petitioned the Chancellor to deduct the amount found due to her, to be paid to him, upon the ground that he had a *lien* on the fund. H, the administrator of R, resisted this petition claiming the fund. **HELD**, that C was entitled to it. *Hoffman Adm'r of Owings vs. Cromwell*, 144
29. In this case it further appeared, that the mother of R, who survived her husband, by her will devised all the residue of her estate to her eight daughters, to be equally divided between them; and that the portion of her estate bequeathed to her daughter R, should be laid out in the purchase of bank stock in the name of R, and her daughter U, the wife of C, should receive the dividends and apply the same to the support of R during her natural life; that R was to be removed to the house of U, and from the death of R the stock was given to U, as a compensation for her trouble in providing for R. And in case U should die before R, then she was to be removed to the house of D, and the testator then gave to D the same power to receive dividends, with the same direction as to their application as in the case of U, and after the death of R, then the stock was to go to D, as a compensation for her trouble. The Chancellor upon the application of C allowed him \$500 per annum for the support of R, which exhausted all the dividends upon her bank stock, and left a larger balance due than the proceeds of the annuity. **HELD**, that the balance of the annuity should be paid to C, out of the proceeds of the real estate devised to W, to the amount of the Chancellor's allowance. - - - - *Ib.*
30. Where an executor is called into chancery to account for and distribute the estate committed to him, there is no principle which will warrant the court in regarding the same claim, as at one time conveying specific property with the profits accruing therefrom—then by an equitable fiction as being converted into money, and bearing interest—and again as attaching on the specific property whereon it originated. *Evans et al. vs. Iglehart, et al.* 171
31. Where a defendant in chancery, liable originally for property in kind, is charged with interest on its value, the plaintiff by thus charging him, relinquishes his claim to the property, which rests absolutely on the defendant upon his payment of its value. An election being once made out to charge the defendant, cannot at a subsequent period be prospectively retracted or abandoned, where the property still remaining in the possession of the defendant may have become greatly enhanced in value. - - - - *Ib.*
32. So where certain personal property had been devised to A for life, remainder to the children of J, C and B, and to such persons as A should appoint by last will, and the property had been converted into money by the executor of the testator. On a bill filed for an account and distribution of the fund after the death of the tenant for life, by some of the remainder men, it was held, that all the remainder men were necessary parties, and for want of them the cause was remanded to chancery under the act of 1832, ch. 302, and that the administrator of A did not represent the persons appointed by her last will. - - - - *Ib.*
33. It is a general rule, that where parties have had an opportunity to use a particular state of facts as a defence at law, courts of equity will not relieve upon the ground that by neglect or accident it was not made use of, or failed on being attempted. *Sasscer vs. Young and Kemp*, - 243
34. Where a suit was brought by plaintiffs as executors, and they recovered judgment, and then revived the same judgment by *scire facias* as executors, from which an appeal was prayed, and an appeal bond

- executed to the plaintiffs as executors, and judgment was obtained upon such bond by one of the original plaintiffs as surviving executor, it is too late for the surety in the bond to insist in equity that the plaintiffs never were executors, or sued upon letters granted by a foreign jurisdiction. - - - *Ib.*
35. If a defendant having the means of defence in his power, in an action against him in a competent tribunal, neglects to use them, and suffers a recovery to be had against him, he is precluded from obtaining relief in Chancery in relation to the same matter. *Gott and Wilson vs. Carr*, 309
36. The cases in which Chancery furnishes relief against recoveries suffered to be had at law, are exceptions to the preceding rule. - *Ib.*
37. A court of equity will not relieve against a recovery, in a trial at law, unless the justice of the verdict can be impeached by facts, or on grounds, of which the party seeking the aid in Chancery, could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party unmixed with any negligence or fault on his own part. And it will only sustain a bill invoking its aid, upon some new matter of equity not arising in the former case, or seeking some relief to which the powers of the court of law were not fully adequate. - - - *Ib.*
38. Chancery will not relieve after a recovery at law, upon testimony which with due care and diligence, the party might have procured, or had the benefit of upon the trial at law, nor upon the ground that a witness was guilty of perjury. - *Ib.*
39. Where property was mortgaged to secure a certain sum of money, and afterwards the improvements on it being destroyed by fire, was sold and did not pay the mortgaged debt; and the mortgagee then applied to a court of equity to enforce a covenant in the mortgage to keep the property insured, and apply the proceeds of the policy to rebuilding it, claiming under that covenant, a lien upon the insurance money, and payment of the balance due him out of it—HELD, that although equity could not administer the relief in the terms stipulated for, as the property was sold, and rendered rebuilding by the mortgagor or his representatives impossible, yet still the creditor was entitled to be paid out of this fund, over which he had a qualified lien, in preference to the general creditors of the debtor or his representatives. *Thomas' Admr's vs. Vonkapff's Ex'rs*, - - - 372
40. When a party is entitled to relief in equity, but from some cause it cannot be obtained in the mode stipulated for between the parties, chancery will still grant relief, though in some other form than the one agreed upon. - - - *Ib.*
41. Whenever a court of Equity is prevailed upon to set aside an agreement, it will be on refunding what has been *bona fide* paid, and making allowances for improvements. *Griffith vs. Frederick County Bank*, 424
42. A creditor at large before judgment, and before he has a certain claim upon the property of his debtor, has not a right to call for a specific execution of his debtor's contracts, for the creditor's benefit. Neither can the creditor, in such case, ask for a rescinding of the contract. - - - *Ib.*
43. The court of Chancery, in decreeing a specific execution of agreements, exercises a discretion regulated by fixed and established rules. *Ib.*
44. In a contract for the sale of lands, when the parties stipulated that, "in case they could not agree on the price, we do agree to leave the same to two disinterested men to fix between us," and the price was to be paid in the year following, and the parties had not fixed the price either by themselves, or by arbitrators appointed for that purpose, a court of Equity will not decree a specific performance. Whether such a contract is valid under the statute of Frauds, *Quere*. - - - *Ib.*
45. To vacate a decree obtained against a man of intemperate habits, there must be evidence that advantage was taken of his indiscretion, or that he was improperly practised upon in obtaining the decree. - - - *Ib.*
46. A creditor whose rights are ascertained by judgment, as against real property, and by judgment and execution, as against personal property, may proceed in Equity to redeem outstanding mortgages against either, for the purpose of applying any surplus to the payment of his debt, and be entitled to a preference according to his legal priority. *Ib.*
47. A creditor can only call upon a court of Equity to sell the real es-

- tate of his deceased debtor, under the act of 1785, ch. 72, upon the ground of the insufficiency of the personal estate to pay his debts. The jurisdiction of the court depends upon the condition therein mentioned. Such insufficiency ought to be alleged in the pleading, and established by the proof. - *Ib.*
48. Under the act of 1795, ch. 88, the Chancellor is authorised to decree a sale of equitable titles or claims to land for the payment of debts, but that jurisdiction is exercised upon the terms prescribed by the act of 1785, ch. 72. - - - - *Ib.*
49. Where the court of Chancery dismisses a bill absolutely, which ought to be dismissed without prejudice to future proceedings by the complainants, that error is corrected by reversing the decree appealed from, and passing a new decree; and in this case, the appellant was decreed to pay costs in both courts. - *Ib.*
50. The right of the vendor to pursue real estate remaining in the hands of the vendor, or volunteers claiming under him, or his alienees with notice, for the recovery of unpaid purchase money, exists only in equity. *Pratt vs. Vanwyck's Executors.* - - - - 495
51. This relief is afforded in equity on the ordinary ground that the claimant is remediless at law. If the vendor can, by any proceeding at law, recover his claim, chancery will not enforce his equitable lien. His remedy at law must be first exhausted, or it must be shown that none exists there, and the proof is upon him. - - - - *Ib.*
52. H being indebted to V, conveyed to him as security, by way of mortgage, a tract of land. Afterwards V assigned this mortgage to P, who gave his bonds for the sum due on the mortgage. HELD, that in the contemplation of a court of equity, the interest sold by V to P, was personal and not real estate, and that there was no implied lien for the purchase money. The thing sold was the debt; the mortgage passes as an appurtenant to the debt, and these are incapable of a separate and independent alienation. - *Ib.*
53. R, after devising to his wife a life estate in his land, further devised as follows:—From and after her decease, I give the said estate to my youngest son, during his natural life; and from and immediately after his decease, the same to my youngest son's first son, and the heirs male of his body, &c. And in case my said youngest son should die without leaving such heirs male, then to my said youngest son's daughter, &c. And in case my said youngest son should die without leaving, at the time of his death, either sons or daughters, or such issue as aforesaid of said sons and daughters, then I give and devise the said lands to my eldest son, and his heirs forever, on his paying my three daughters, three dollars per acre for all the land lying, &c. The testator's youngest son died in infancy without issue. Upon a bill filed after the death of the youngest son, by the husband of one of the testator's daughters, for a portion of the three dollars per acre, *but in the life-time of the testator's widow*, it was held that the bill was prematurely filed, and should be dismissed; that although the legacies were a charge upon the land, and became absolutely vested upon the death of the youngest son without issue, in the life-time of the daughters, still the devisee was not to pay the legacy before the land fell into his possession. *Spencer vs. Robins,* - - - - 507
- See Executor and Administrator, 1.
- Fraud, 1.
- Injunction—
- Lien, 1.
- Mortgage.
- Pleas and Pleading in Equity.
- Practice in Chancery.
- Surety.
- Usury, 1, 2, 3.
- ### COVENANT.
- Covenants to repair and rebuild on the land, are covenants running with the land; and so is a covenant to effect insurance and apply the proceeds in case of a loss by fire, to the reparation of the insured property. *Thomas' Adm'rs vs. Vonkapff's Executors,* - - - - 372
- ### DEBTOR AND CREDITOR.
- Rights between, as to interest accruing after sale of debtor's property in Equity for payment of debts generally. *E. T. and A. Ellicott vs. T. Ellicott.* - - - - 35
- See Court of Chancery, 42, 46.
- Surety.
- ### DECREE.
- Effect of decree of distribution in favor of heirs, as against creditors.
- See Court of Chancery, 3.

DEED.

Where a deed of settlement was defectively executed, and the legislature upon the application of the grantors made another settlement, the first deed is not affected by the subsequent legislative general acts intended to cure deeds defectively executed. Such a deed is not embraced by the spirit or intention of those healing acts. *Dulany and wife and Dangerfield vs. Tilghman*, 461
See Bond, 1, 2, 3.

— Presumption, 1, 2, 3.

DELIVERY.

See Bond, 1, 2, 3.

DEVISE.

See Will and Testament.

DISTRESS.

Distress can only be levied for the rent itself. Interest cannot be levied for. *Dennison vs. Lee and wife*, 383.

EJECTMENT.

1. In an action of ejectment, brought by a purchaser, to recover the possession of land purchased by him at a sheriff sale, it is not necessary for the plaintiff to prove a seizure of the land by the sheriff, for the purpose of supporting his title. *Estep and Hall's lessee vs. Weems*, - - 303
2. It is the sale of the sheriff which vests the title in the purchaser, which sale must be proved either by a deed, the sheriff's return to the *feri facias*, or *vendi*, or memorandum in writing, in order to comply with the statute of frauds. - - - *Ib.*
3. When the plaintiff in ejectment claimed title under a sheriff's sale, and in proof of his title showed a judgment, *feri facias*, *vendi* describing the land sold with sufficient certainty, and deed from the sheriff who made the sale, no error or defect in the schedule made at the time of the levy under the *feri facias*, can be relied upon to defeat the sale. - - - - - *Ib.*

EMBLEMENTS.

See Executor and Administrator, 7, 8, 9.

ESTOPPEL.

Estoppels are not favoured in Equity. *Collinson vs. Owens and al.* - - 4
See Court of Chancery, 34, 35.

EVIDENCE.

1. An admission of a debt by an ex-

ecutor, even a judgment against him, is no evidence against the heir to take the case out of the act of limitations. *Collinson vs. Owens, et al.* - - - - - 4

2. A witness cannot be permitted, upon the mere exhibition of an account to him at the trial, or under a commission, to swear that he believes the account to be correct, and the goods mentioned in it were sold to B, by the plaintiff, upon the faith of a letter of credit given by the defendant, though the letter had then been given in evidence to the jury. *Salmon vs. Feinour*, - - - - 60
3. A mere inquiry into the belief of a witness, which may have no other foundation than hearsay, is not competent. With respect to the belief or persuasion of a witness, founded on facts within his own knowledge, it is otherwise. On questions of identity of persons and hand writing, it is the common and prudent practice of witnesses to swear to their belief only, which is always admitted. - - - - - *Ib.*
4. In a suit by the assignee of a single bill against the assignor, the obligee, on the failure to pay by the obligor, and on the question of due diligence by the assignee in pursuing the obligor, the admissibility of parol evidence of the notorious insolvency of the obligor cannot be questioned. It may also be proved by other evidence, such as a discharge of the obligor under the insolvent law, or the return of *nulla bona* to a *feri facias* sued out on a judgment obtained against him on the single bill. *Crawford vs. Berry*, - - - - 63
5. To disqualify a witness on the ground of interest, the party objecting to his competency must show the disqualifying interest. *Callis vs. Tolson's executors*, - - - 80
6. The widow of a deceased testator, who had renounced, in a contract with the executors of the deceased, her rights in the real and personal estate of the deceased, and agreed to accept compensation from such executors for such renunciation, is a competent witness in an action of replevin, brought by the executors for a negro, to prove, that such negro was loaned to the defendant many years before by her husband, who had declared he never would give the slave in question to the defendant, or any of his family; the will of the testator not being in evidence, nor it appearing to the court

- that the witness had any special interest in such slave, and the contract with the executors being personal to them, and not binding the assets of the estate. - - - - *Ib.*
7. Upon a bill filed by a security to obtain an injunction and relief from a judgment against him on a bond, alleging the bond to have been founded as an usurious consideration, the principal obligor is not a competent witness for the complainant. *Jordan vs. Trumbo*, - - 103
8. Upon a contract for the sale of land, the number of acres not being then ascertained, a survey was agreed upon. The land was estimated at three hundred acres, and it was further agreed that any excess should be paid for at the same rate. The vendor executed a bond of conveyance, and the vendee gave his bond for the purchase money. Held, that parol evidence was admissible to establish an independent contract in relation to the excess above three hundred acres, if the bonds were silent upon that subject. *Hall vs. Maccubbin*, - - - - 107
9. C on the 6th January, 1819, gave his bond to B, with M as his surety. M died leaving R his executor, who in September, 1819, gave a testamentary bond with P as his surety. On the 21st April, 1823, two suits were docketed, and judgments entered by confession in the *Anne Arundel* county court in the name of B, one being against C and the other against R, as executor of M. These judgments were rendered the first day of the term, and on the declaration in each case, was endorsed as follows, "file this and enter judgment with a stay of execution for three years."—Signed S attorney for plaintiff, and W attorney for defendant. In an action upon R's testamentary bond against the executors of P, his surety (of which said executors R was one) brought for the use of B, to recover the amount of the aforesaid judgment against R as executor of M, the issues were so made up as to present the questions: 1st. Whether the stay of execution upon the judgment against C, was so entered with the consent of R as executor of M; and 2d. Whether the stay of execution entered upon the judgment against R as executor of M, was entered with the consent of the executors of P. At the trial the plaintiff prayed the court to instruct the jury, that from the facts in the cause they *might infer* the consent of R to the stay given to C, which instruction the county court refused, and upon appeal by this plaintiff, the refusal was held to be erroneous, and the judgment reversed and *procedendo* awarded. *State use of Barber vs. Philip Hammond's executors*, - - - - 157
10. Accounts passed by an executor before the Orphans court, pending a controversy in a court of Chancery between the executor and claimant, are admissible in testimony before the auditor of the Chancery court; they are however only *prima facie* evidence. *Evans et al. vs. Iglehart et al.* - - - - 171
11. In an action against the assignor of certain bonds, to show the inutility of proceedings against the obligor, the bonds being payable in 1823-4 and 5, the certificate of the clerk of the proper court, "that it appears on the docket of August court, 1824, that the obligor had a personal release under the insolvent laws of the State; and that he again applied for the benefit of the insolvent laws of the State on the 13th March, 1830; that his day for appearance was on the second Monday of December, 1830, and by his schedule has made return of no property except what is taken under a distress for rent," is not sufficient upon a case stated, to enable the court to assume the inability of the obligor's estate, in the years 1824-5-6, and to the institution of the suit in 1829, to pay the claim, if he had been sued; although it might have been sufficient to induce a jury to find the fact of the insolvency. *Lewis vs. Hoblitzell*, - - - 259
12. In an action against W and H as joint obligors of a single bill, signed and sealed in a partnership name, H who had suffered a judgment by default, upon the plea of *non est factum* by W, was offered as a witness by the plaintiff, to prove the execution of the single bill by H, in the presence of and with the consent of W, and also to prove another single bill in the hand-writing of W, and to which he had affixed the partnership name,—HELD, that H was not a competent witness, being interested in fixing W's liability. *Albers vs. Wilkinson*, - 358
13. Where a warrant is traced to the hands of a magistrate, who swears

to its loss, parol evidence of its contents may be given as in other cases.

Hall vs. Hall, et al. - - - 386

14. It is a general rule, that under the plea of *non cul*, in an action for defamatory words, the defendant may give evidence of such facts and circumstances, as show a ground of suspicion of the truth of the matters charged, not amounting to justification, or proof of guilt of the plaintiff, in *mitigation of damages*, but not in bar of the action. *Rigden vs. Wolcott*, - - - 413

15. A witness who has given testimony of the occurrence of any event, at a particular period, the time of which is material, can strengthen his evidence by proving that it happened at the same time with, or before, or after, a particular epoch or transaction, the date of which can be proved with greater certainty. *Goodhand vs. Benton, Jr.* - - 481

16. Evidence offered under a cross examination, as well as on an examination in chief, must be pertinent to the issue, or have some connexion with, or immediate influence on, material evidence adduced on the trial. - - - *Ib.*

17. A witness cannot be cross-examined upon irrelevant matter, impertinent to the issues in the cause, for the purpose of impeaching him; and when such immaterial evidence has been brought out, it will not authorize the introduction of contradictory proof for such purposes merely. - - - *Ib.*

See Answer 1,

— Contract, 3.

— Practice in Chancery as to infants.

EXECUTION.

See Ejectment, 1, 2, 3.

— Fieri Facias.

— Habere facias Pos.

— Sheriff, 1, 2.

— Surety, 2.

EXECUTOR AND ADMINISTRATOR.

1. Where an executor or administrator pays to creditors a greater amount of assets than he has received, and the personal estate of the deceased is insufficient to pay his debts, he may be substituted in equity to the rights of the creditors so overpaid, and may proceed against the real assets of the deceased, upon the same terms, conditions and proof, and subject to the same defences, as the creditors themselves if unpaid

might have proceeded upon and been bound by. *Collinson vs. Owens, et al.* - - - 4

2. An admission of a debt by executor, even a judgment against him, is no evidence against the heir to take the case out of the act of limitations. - - - *Ib.*

3. When an executor negligently leaves an estate unsettled for ten years, and then suffers the accounts of the estate to remain before the auditor of the court of equity, for several years before any statement was reported, he is justly chargeable with interest. *Lyles vs. Hatton*, - - - 122

4. After an estate has been ten years in the hands of an executor, he was notified of a claim on the part of the *United States*, and upon his application to the Orphans court, they permitted him to retain a sum in his hands to abide its event. The claim of the *United States* was ultimately defeated. *Held*, that under the circumstances, the order of the Orphans court ought not, like an injunction against payment, to be regarded as a sufficient ground for the suspension of interest, upon the sums due the distributees of the estate, - - - *Ib.*

5. Where a defendant has given bond for payment of debts and legacies of a deceased person whose executor he was, in an action against him as executor, he cannot plead *plene administravit* or *nulla bona*, and this, though the action is not founded upon the bond for such payment. Per ANNE ARUNDEL CO. COURT. *State use of Barber vs. Hammond's Executors*, - - - 157

6. Executors may claim an allowance for sums of money necessarily expended by them in clothing and maintaining the testator's slaves unable to work and maintain themselves, and similar allowances may be made to them in relation to slaves able enough to work and maintain themselves. Sometimes clothing is indispensable before they can be hired out, as slaves may be most profitably hired out, the executor furnishing clothing and maintenance—or where they are employed in finishing and preparing for market, crops on the testator's land, and by which the assets of the estate are sought to be increased. *Evans et al. vs. Iglehart, et al.* 171

7. Clover and hay growing on real estate are not emblements, and do not

- as such form a part of the personal estate of a deceased. These pass to the devisee, and not to his executor. Neither of these articles whilst growing, are the offspring of *annual* labour and cultivation. *Ib.*
8. Crops planted or sown by the testator in his life-time, and which are gathered during the summer and autumn next succeeding his death, constitute a part of the personal estate. - - - - - *Ib.*
9. The increase and income resulting from personal property, specifically bequeathed, when the assets are abundant to pay debts and legacies, enure to the benefit of the specific legatee, and form no part of the general residue of an estate. - *Ib.*
10. In *England* it is the duty of the executor or administrator to collect and speedily reduce into money the personal assets when not otherwise directed. Such never was the practice of executors and administrators in this State, and such a course of proceeding is wholly inconsistent with the policy and provisions of our testamentary system; and particularly inapplicable to slaves. *Ib.*
11. Executors and administrators in *Maryland* are required to divide specifically, or in other words, "in kind," between the legatees and distributees of the deceased, except so far as a sale may have been necessary for the security and benefit of the estate in respect to the particular property sold, and the payment of debts, legacies, funeral charges, &c., or where they are unable to make a satisfactory distribution amongst the claimants, then under an order of the Orphans court they are to make sale of so much of the surplus as consists of specifics. *Ib.*
12. Where an executor or administrator in his representative character is sued in a court of law, assets are presumed, unless as a fact, it be put in issue by the pleadings; but in a court of equity assets in his hands must be alleged, and if denied or not admitted, must be proved. - *Ib.*
13. An executor is entitled to a commission on the excess of sales over the appraisement. *Evans, et al. vs. Iglehart, et al.* - - - - - 171
14. An executor or administrator takes the funds of the deceased to be distributed according to law, subject to such preference as the law allows. The moment the debtor dies the law asserts the rights of the creditors, and takes the property into its hands, and makes or directs the distribution of it according to their priority; that being the law of deceased persons' estates which a testator cannot by his will defeat *State vs. Bank of Maryland*, - 205
15. Where joint administrators unite in the same testamentary bond, they are jointly and severally answerable not only each for his own acts, but also each for the acts of the other. When they do not design to place themselves in that attitude, they should execute separate bonds. *Clark and wife vs. State use of Williams*, 288
16. So where the plaintiff had obtained judgment against H, as the surviving administrator of U, and issued a *fi fa.*, upon which the *nulla bona* was returned, and then sued the administrator of C, (who had been in his life-time joint administrator with H, upon the estate of U, upon the joint testamentary bond of H and C; it was HELD, that for this *devastavit* of H, the joint bond was answerable. - - - - - *Ib.*
17. An executor in finishing the growing crops of the deceased, is not bound to discharge the duties of an overseer. He may employ and pay out of the assets in his hands, as many overseers as are necessary for the completion and preservation of the crops. If with more advantage to the estate he acts in the capacity of an overseer himself, it is competent for the Orphans court to allow him a reasonable compensation for his services. *Lee vs. Lee and Welch*, 309
18. When a claim of an executor for compensation for services rendered the deceased's estate as overseer after the testator's death, is contested before payment, its passage by the Orphans court is no evidence of its correctness. It must then be supported by testimony, substantially sufficient to establish the facts before a jury. - - - - - *Ib.*
19. Where there were two joint executors, and the will as to one of them, declared that he should not be allowed any commission as executor, in consideration of the provision made for him in the will, the Orphans court cannot allow more than one half of the *maximum* rate of commission to the other executor. *Ib.*
20. T and M in contemplation of marriage, agreed that all the property of the intended wife, (M,) and estate of every description to which

she was then entitled, or might thereafter become entitled, should be, and was thereby conveyed to a trustee and his heirs in trust, for the use and benefit of the said M, her heirs and assigns forever, without impeachment of waste; all which property to be under, and subject to the exclusive and entire management and control of the said M, her heirs, &c. without the interference in any manner of the said T; and the said M, her heirs, &c. to receive and enjoy the rents, &c. thereof, with power to M, to sell and dispose of the said estate by last will as if she were a *feme sole*. After the marriage and death of the wife without will; HELD, that the true character of the contract was not a temporary surrender of the marital rights over the estate during the life of M, but an entire abandonment of them, and therefore he was not entitled to administration upon her estate. *Ward and wife vs. Thompson*, - - 349

21. Where the contract of marriage merely suspends the marital rights over the wife's estate during her life, and she fails to exercise the right of appointing an executor, where the right to devise is secured to her by the contract; then the husband is entitled to administration and to the undisposed personal estate, and chooses in action of his wife. - - - - - *Ib.*

See Court of Chancery, 28, 34.

— Surety, 2.

— Wills and Testament, 5.

EXECUTORY DEVISE.

See Court of Chancery, 27.

— Will and Testament, 2, 3, 4.

FIERI FACIAS.

1. A return to a *fieri facias* by the sheriff, that he had levied upon a part of a tract of land, is void for uncertainty. *Waters vs. Duvall*, 76

See Ejectment, 1, 2, 3.

— Sheriff, 1, 2.

FRAUD.

1. When a mortgage is obtained by the misrepresentation of the mortgagee, it is void; and it is immaterial as to its legal effect upon the instrument, whether the mortgagee at the time he made the misrepresentation knew it to be false. If he made a statement of facts, knowing it to be false, it would clearly be a legal fraud; but although he did not know that it was false, yet, if he under-

took to state it to be true, without a knowledge of its truth or falsehood, and it operated as a deception to the other party to whom it was made, and thereby induced the mortgage, it would avoid it. The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the statement made as true, was believed to be true, and therefore, if false, deceived the party to whom it was made. *Joice et ux. vs. Taylor*, 54

See Court of Chancery, 21.

GUARANTY.

See Assignment, 1, 2.

HABERE FACIAS POSSESSIONEM.

1. The county court upon a sale of lands under an execution, ought not to issue a writ of *habere facias possessionem*, under the act of 1825, ch. 103, where after the return of the execution it does not appear from the record, that notice was given to the tenant in possession, to show cause why the writ of *habere* should not issue. *Walters vs. Duvall*, 76
2. The tenant against whom a writ of *habere facias* has been issued, under the act of 1825, ch. 103, and who has been ejected by it, may upon its return move the court to quash it for the purpose of awarding him restitution. He is not bound to apply for relief before its return, and may then make objection to the sufficiency of the *fieri facias* or its return, and show cause why the *habere* should not have issued. - *Ib.*

HEIR.

Rights of heirs against creditors.

See Court of Chancery, 3, 8 to 19—20.

— Evidence, 1.

— Executors and Administrators, 2.

— Lien, 1.

IDIOTS.

See Court of Chancery, 28, 29.

IMPROVEMENTS.

See Mortgage, 11.

— Court of Chancery, 42.

INDEMNITY.

1. A deed executed to indemnify endorers, who became such for the grantor at his request, is founded upon a good consideration, and vests his interest and estate in, and title

to, the property conveyed, in the grantees, until it has performed its office of indemnifying them from responsibility; it cannot be impeached at the instance of a creditor, whose pretensions can only be considered equally meritorious. *Griffith vs. Frederick County Bank*, 424

2. Indemnity is a good consideration within the Statute of Frauds; and the Statute of Elizabeth does not extend to conveyances made upon good consideration and *bona fide*. *Ib.*

INFANT.

See Court of Chancery, 5, 26, 27.

— Practice in Chancery, 1, 2.

INJUNCTION.

1. A judgment at law may be enjoined in part in equity, and when the circumstances require it, a court of equity should perpetuate the injunction as to part, and dissolve it as to the residue. *Lyles vs. Halton*, 122
2. Where the plaintiff levies his execution upon the defendant's real property, and after several writs of *vend*i successively issued, the sheriff, by the order of the plaintiff's attorney, returned the *vend*i "not sold by order of the plaintiff's order," and no further steps had been taken; this state of the fact will not authorise the security of the defendant in the appeal bond, which had been given upon the appeal taken from the original judgment at law, to apply to a court of equity for an injunction to stay proceedings against such security founded upon a judgment on the appeal bond against him. *Sasscer vs. Young and Kemp*, - - - - - 243

See Court of Chancery, 21.

INSOLVENT DEBTOR.

1. P, who was guardian until 1817 to the plaintiff, received in 1828 from the board of commissioners appointed to distribute the fund paid to the *United States*, by virtue of the convention of 1826, the sum of \$3000, as compensation paid by the *British* government for certain captured and deported negroes formerly the property of the plaintiff, and paid the same to the defendant. The slaves were carried off from the State, during the war in 1814, by the naval officers of *Great Britain*. The plaintiff petitioned for the benefit of

the insolvent laws in 1822, and was finally discharged in 1823. The defendant was his permanent trustee. The action was brought to recover the \$3000, and the county court instructed the jury, that if they should believe the plaintiff was regularly and legally discharged under the insolvent laws of this State, then the plaintiff was not entitled to recover. Upon appeal this instruction was reversed, and the permanent trustee held entitled to the funds. *Plater vs. Scott*, - - 116

2. A debtor in failing circumstances may prefer one creditor to another by a transfer of his property, made in *good faith*; nor is there any objection under similar circumstances to the validity of a transfer by a debtor of his whole estate to trustees for the equal benefit of all his creditors. *The State vs. The Bank of Maryland*, - - - - - 205
3. The principle is the same whether the deed of transfer is made by a corporation or an individual. *Ib.*
4. A *bona fide* assignment of property by an insolvent individual to a trustee for the benefit of his fair creditors, is a valid sale and transfer of the property for a valuable consideration; a like transaction by an insolvent corporation in relation to the property subject to its debts, is equally a good sale and transfer of it. *Ib.*
5. A corporation not being a person capable of taking the benefit of the insolvent laws of this State, is not affected by the act of 1812, ch. 77, sec. 1; and 1816, ch. 221, sec. 6. *Ib.*
6. Under the insolvent laws of this State, the intent to give an undue preference by a debtor making a transfer of his property to a creditor or surety, is to be considered as subject to the distinctions which have obtained under the bankrupt laws of *England*, between a voluntary and involuntary transfer; and therefore to avoid a transfer under our system, it will be necessary to establish, that the debtor made the transfer with a view or expectation of taking the benefit of the insolvent law, and also that he voluntarily made the transfer sought to be vacated. *Crawford and Sellman vs. Taylor*, - - - - - 323
7. That transfer is not to be considered voluntary which is made to a creditor demanding payment, although the debt is not due at the

time the transfer was made. The creditor is entitled to use vigilance, and obtain security, as well before, as after the debt is payable. - *Ib.*

See Banks.

— Corporation.

INTEREST.

1. Where a money rent is reserved in a lease of land, payable on a certain day, and is not paid, it carries interest as a matter of right. *Denison vs. Lee and Wife*, - - 383
2. A distress can only be made for the rent itself—interest on rent in arrear cannot be distrained for—but in an action of debt for rent, interest is recoverable. - - - - *Ib.*

See Appeal, 6.

— Court of Chancery, 8 to 14, 19.

— Executor and Administrator, 3, 4.

JURISDICTION.

1. The county courts have concurrent jurisdiction with Chancery in questions of fraud. *Gott and Wilson vs. Carr*, - - - - - 309
2. An action upon the case in the nature of waste, can, upon the principles of the common law, be only maintained in the county court of the county where the trespass was committed. It is a local and not a transitory action; but if the plaintiff alleges in his declaration that the defendant has removed out of the county where the property wasted may lie, and cannot be found in such county, then, under the act of 1785, ch. 87, sec. 4, the defendant may be sued in the court of any county where he or she may be found. *Patterson vs. Wilson*, 499

See Attachment, 4.

JURY.

1. The object of the 9th section of the act of 1797, ch. 87, was to give to the parties, plaintiff and defendant each, the privilege of striking from the list of twenty jurors, four of the jurors against whom no cause of challenge could be established. *Lee vs. Peter*, - - - - - 447
2. To secure the full enjoyment of this privilege, the panel before it is stricken from, should present twenty names beyond the reach of challenge, either as a principal cause or to the favor, and the parties have the right to have their causes of challenge heard and determined upon before the panel is drawn from the ballot box. - - - - - *Ib.*

See Evidence, 9.

— Presumption.

JUSTIFICATION.

See Sheriff, 1 to 7.

LACHES.

See Assignor, 1.

— Vendor and Vendee, 1.

LANDLORD AND TENANT.

1. S conveyed to G several tracts of land, and personal property, to be held by G in "trust for the use of S during his life; and after his death, in trust for his daughter E and her four children, share and share alike as tenants in common." Upon the death of S, the trustees went into full possession of the whole property, and soon after requested E to take possession of the farm, agreeing with her at the time, that she and her children, should eat and wear, each, her and his, fifth part of the proceeds of the property under the deed of trust; reserving to himself, G, the right at all times to manage and control all the trust property by himself and agents. Under these circumstances E with her children went upon a farm, part of the trust property:—**HELD**, that the right of management reserved to G, was to be exercised during E's possession; that it did not authorise him to dispossess her at pleasure, nor depute others to do it; but was a mere right of supervision and general direction as to the course of cultivation and general conduct of the property; and the legal effect of this agreement was *not* to create a tenancy at will, but a tenancy from year to year on that part of the premises only, which was secured to the children by the deed, leaving E to the full enjoyment of her absolute right of property in her fifth part of the estate. *Hall vs. Hall, et al.* 386
2. The inclination of the courts has long been against that construction of a demise, which will create an estate at will. - - - - - *Ib.*

See Distress.

— Interest, 1, 2.

LEGACY.

1. The rules of law in relation to legacies make a distinction between such as are payable out of real, and such as are payable out of personal estate; and legacies which they hold to be vested and transmissible when payable out of the latter, will sink for the benefit of the heir or devi-

see, when charged on the real estate. *Spencer vs. Robins*, - 507

2. As, if a legacy is given to a legatee by words of immediate or present gift, but payable at a future period, as at the age of twenty-one, it is deemed a vested legacy; and if payable out of the personal estate, will *not* lapse though the legatee should die before the period arrives designated for its payment, but on his death will be transmitted to his personal representative; but if such legacy be charged upon land, it will merge in the land for the benefit of the heir at law or devisee. - *Ib.*

LIBEL.

See Evidence, 14.

— Slander, 1, 2.

LIEN.

The mere loan of money to a deceased party in his life-time, for the purpose of purchasing land with, does not of itself create a lien on the land for its repayment; and consequently cannot be relied upon as evidence to rebut the plea of limitations insisted upon by the heir of the debtor, in defending his real estate from a claim of the lender. *Collinson vs. Owens, et al.* - - - - 4

See Court of Chancery, 20, 28, 29.

— Priority in payment of debts.

LIMITATION OF ACTIONS.

1. When property replevied, was loaned to the defendant by the plaintiff, and held and used by him under and in virtue of such loan, though for more than three years before the suit was instituted, such possession does not sustain the plea of the act of limitations. The principle in such case is the same as in a contract of hiring. *Callis vs. Tolson's Ex'rs*, - - - - 81
 2. The right of a plaintiff to recover property is not barred by the possession of the defendant, accompanied by a claim of title to the property, for more than three years before the institution of the suit, if the possession was originally acquired by loan, and the plaintiff had no knowledge of the adversary claim of the defendant, three years before the suit was brought. - *Ib.*
- See Executor and Administrator, 2.
- Lien, 1.
- Pleas and Pleadings in Equity, 1.

LOCAL ACTION.

See Jurisdiction, 2.

MALICE.

See Slander, 1, 2.

MANUMISSION.

See Negroes and Slaves.

MITIGATION OF DAMAGES.

See Evidence, 14.

— Slander, 1, 2.

MORTGAGE—MORTGAGOR AND MORTGAGEE.

1. Where a mortgage is infected with usury, though neither the mortgagee, nor his alienee, can proceed in equity for a foreclosure, yet the mortgagor cannot redeem without a tender of the sum really due in conscience. *Trumbo Ex'r of Neff vs. Blizzard and Jacobs*, - - - 18
2. When a mortgage of personal property contains no agreement that the mortgagor should retain possession until forfeiture, and the mortgagee permitted the property to remain for some time in the possession of the mortgagor, but afterwards and before forfeiture took it away, the mortgagor cannot maintain trespass for such asportation. *Jamieson vs. Bruce*, - - - 72
3. Courts of equity consider a mortgage as a mere security for money, but this is not the light in which it is viewed in courts of law. Upon execution of the mortgage the legal estate becomes immediately vested in the mortgagor, and the right of possession follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly admitted until the will of the mortgagor is determined. - - - *Ib.*
4. Where there was a loan of money, and a mortgage given on the 13th May, 1828, as a collateral security for the repayment of it; and on the 7th of November, 1828, an absolute deed for the same property was given by the borrower to the lender, who executed a bond for the reconveyance of the same property at the expiration of twelve months, upon the payment of the same sum of money for which the original mortgage was given as collateral security, a court of equity will determine from the facts and circumstances connected with the course of dealing between the parties,

Whether a conditional sale or mortgage was intended in fact by the parties. *Dougherty vs. McColgan*, 278

5. A transaction constituting a mortgage cannot be converted into a sale; therefore the leaning of courts of equity in doubtful cases is against the lenders of money, and they hold such cases rather to be mortgages than conditional sales. - - - *Ib.*
6. Whenever the intention is to take a security for a subsisting debt, or for money lent, and to avoid or restrict the equity of redemption, Chancery seeking to protect the debtor against the rapacity of the creditor, and to do full and equal justice between the parties, will defeat such intention, by treating the transaction as a mortgage. - *Ib.*
7. A covenant to pay the debt or to repay the money lent, is not an indispensable ingredient in a mortgage. If a security for the money is intended, that security is a mortgage, though not bearing upon its face the form of a mortgage. - *Ib.*
8. When the relation of mortgagor and mortgagee is once established, though the equity of redemption may be sold or disposed of to the mortgagee, yet unless the transaction appears to be fair, and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor. *Ib.*
9. It is a general principle in Chancery, though not without exceptions, that a mortgagee in possession, is not to be allowed for new improvements erected upon the premises. *Ib.*
10. A mortgagee before foreclosure is not the substantial owner, nor under any obligation to make any repairs, but such as may be necessary. *Ib.*
11. Where the property mortgaged exceeded in value the sum lent, and where there was no proof that it had begun to fall into decay; where there was no proof the houses upon the premises were in a ruinous state, and that the mortgagee pulled them down and built new ones as substitutes; where there was no long continued possession, and acts of ownership by a mortgagee, and acquiescence by the mortgagor, with no claim of the right to redeem; where the mortgage was ex-

ecuted and the improvements commenced about three years after, and not finished when a bill to redeem was filed, and where the mortgagor during the whole term kept up a continual claim of the right to redeem, and had no notice of the design to put up new improvements, IT WAS HELD, upon a bill to redeem, that the mortgagee could not claim to be paid for new buildings, which he had erected upon the mortgaged premises, but must surrender the property upon the payment of his debt and interest. *Ib.*

12. In a mortgage of real property given to secure the repayment of \$20,000, borrowed money, T, the mortgagor, covenanted that he would at all times, during the existence of the lien hereby created, at his own proper cost and charge, cause and procure, the insurance against loss by fire already effected on the mortgaged premises to the amount of \$19,000, to be kept up and renewed; and that in case of loss, the sum insured shall be immediately applied to the rebuilding, replacing and putting the said property and premises in the like good order and condition that the same now are in, so that the said V, (the mortgagee,) his heirs, &c. shall in case of loss by fire be benefitted by such insurance, or participate in the benefit thereof, to the extent of his aforesaid lien."—Upon the construction of this contract, IT WAS HELD,

1. That the parties evidently looked to the estate mortgaged, if it remained without deterioration, as sufficient to satisfy the debt which it was taken to secure.

2. That the design of this covenant was by the insurance, always to have a fund for re-establishing the premises, so that the security should not be in any manner diminished.

3. The insurance was one for the benefit of the mortgagee, to the extent of his lien. He was not entitled to the money, but to have it applied to the rebuilding of the premises in the like good order in which they were at the time of the contract, and such an appellation of the money would be coerced in equity, which would consider the mortgagor, if he received the insurance money, as a trustee for that object.

4. That as the mortgaged property was clothed with a trust in refer-

ence to this fund, the legal representatives of the mortgagor must also take it subject to the trust.
Thomas' Adm'r vs. Vonkapff's Ex'rs.

372

See Court of Chancery, 19, 52.

— Fraud, 1.

— Indemnity, 1, 2.

— Usury, 2, 3.

NEGLIGENCE.

See Action on the case, 1.

— Principal and agent.

NEGROES AND SLAVES.

1. A negro in this State is presumed to be a slave; and on a petition for freedom, must prove his descent from a free ancestor, or that he has been manumitted by deed or will.
Burke vs. Negro Joe, - - - 136.

2. Deeds of manumission are not exceptions to the general rule, that the existence of a deed may be presumed under circumstances. - *Ib.*

3. The presumption of a deed to give freedom, must be founded on acts inconsistent with a state of slavery, known to the owner, and which can only be rationally accounted for, upon a supposition that he had intended to free his slave. - - *Ib.*

4. When the exercise of apparent freedom is without the knowledge of the owner of a slave, or where the owner died soon after the slave commenced to act as free, and no administration had been taken out, no presumption of freedom can be drawn. - - - - *Ib.*

5. Circumstances under which a jury may presume a deed of manumission stated. - - - - *Ib.*

See Action on the case, 1.

— Executor and Administrator, 6, 9, 10.

— Will and Testament, 2, 3, 4.

NEW TRIAL.

A new trial will not be granted merely for the purpose of giving to a party the opportunity of impeaching the testimony of a witness.
Gott and Wilson vs. Carr, - 309

PARTNER—PARTNERSHIP.

One partner has no right to bind his co-partner by deed or specialty, without his consent or authority, derived from him for that purpose.
Albers vs. Wilkinson, - - - 358

PATENT.

See Presumption, 1.

PLEAS AND PLEADING.

1. An Executor who has given bond for payment of debts and legacies, cannot plead *plene administravit* or *nulla bona*. *State use of Barber vs. Hammond's Ex'rs*, - - - 157

2. Assets in an action at law against an executor by a creditor, are presumed to exist unless put in issue by the pleadings. *Evans et al. vs. Iglehart, et al.*, - - - 171

3. In pleading upon a contract to deliver goods upon a certain day which is in fact Sunday, in an action brought to recover damages for a failure to deliver, the plaintiff having agreed to pay the price of the article contracted for on its delivery, he must aver his readiness to pay at the time and place, when and where, by the legal construction of the contract the delivery was to be made. *Kilgour vs. Miles and Goldsmith*, - - - - - 268

4. It is the duty of the court to notice the days of the week on which particular days of the month fall. *Ib.*

5. Upon demurrer the court looks for the first defect in the pleadings. *Ib.*

6. Whether the plea of general performance in an action upon a replevin bond be a correct plea or not, if incorrect, it can only be objected to upon demurrer. *Doogan vs. Tyson, et al.* - - - - 453

7. The plea of general performance where correctly pleaded renders it necessary for the plaintiff to show his cause of action in his replication, and to state the breaches of the condition of the bond upon which he expected to rely. - - - *Ib.*

8. In an action upon a replevin bond, the defendant pleaded general performance; the plaintiff replied, after setting out the proceedings in the return, that the defendant had not made a return of the said goods, or any of them, and did not prosecute his suit with effect. The defendant rejoined, that the goods, &c. mentioned in the replication were not replevied and delivered to him under the writ of replevin in the replication mentioned, and that he did prosecute his suit with effect. To this rejoinder the plaintiff demurred specially—for duplicity—departure—and that the issue tendered by the rejoinder of the non-delivery of the goods under the writ of replevin was an immaterial one

HELD, that as the double response in the defendant's rejoinder was only an answer to the breaches assigned in the plaintiff's replication, the objection for duplicity could not be sustained; but that the fact of the non-replevy and delivery of the goods under the original writ was so alleged in the rejoinder in this cause as not to be decisive of the right of action, as a part and not the whole might have been replevied and delivered; and therefore the issue was immaterial and the rejoinder bad. - - - - - *Ib.*

PLEAS AND PLEADINGS IN EQUITY.

1. In equity the act of limitations may be taken advantage of, where the defendant alleges that he relies upon, and pleads in bar a certain act of General Assembly made at a session, &c. entitled "an act for limitation of certain actions," &c. and prays to have the full benefit of the same at the hearing. *Dorsey vs. Dorsey, et al.* - - - - - 12
2. An infant's answer is not evidence against him, being considered the act of the guardian *ad litem*. *Harris vs. Harris,* - - - - - 111
3. To a creditor's bill charging the insufficiency of a personal estate to pay debts; that the personal estate left by the intestate had been expended by the defendants, his brothers and sisters, *without administration*; that the debtor died without heirs of his body, and praying for a sale of the real estate of the deceased to pay debts and for *general relief*; the defendants pleaded, that they are not the heirs at law of the deceased debtor. The case being put down for hearing on bill and answer, the Chancellor dismissed the bill upon the ground, that the plea was a disclaimer by the defendants of all interest in the real property intended to be affected by it. *Upon appeal*, the decree was reversed, and remanded to Chancery for further proceedings. *Bently vs. Cowman,* - - - - - 152
4. A disclaimer is where the defendant renounces all claim to the subject of the demand made by the plaintiff's bill. - - - - - *Ib.*
5. Pleadings in a court of equity are founded in the purest principles of ethics, and marked by frankness and fair dealing, and hence a dis-

claimer ought in terms to renounce all claim to the subject demanded by the bill. - - - - - *Ib.*

6. When there is no formal prayer in a bill for an account, yet if facts authorising it are sufficiently charged, the prayer for general relief will entitle the complainant to an account, as where the defendant is charged with facts which make him an executor *de son tort*. - - - - - *Ib.*
 7. Where an executor is sued in equity assets in his hands must be alleged in the pleading, and if denied or not admitted, must be proved. *Evans, et al. vs. Iglehart, et al.* - - - 171
- See Court of Chancery, 5, 6, 21, 25.
— Will and Testament, 5.

PRACTICE.

1. The court in refusing to grant the defendant's prayer, that for certain specified reasons the plaintiff is not entitled to recover, ought not to go further and assume that the parol evidence of the plaintiff necessarily establishes his claim, for that would be an encroachment on the province of the jury. *Crawford vs. Berry,* 63
2. A motion to quash a writ issued by a court of law is exclusively cognizable there, subject however to revision in an appellate tribunal; and hence an application to a court of Chancery for an injunction founded upon a defect in the writ, though granted, and afterwards dissolved upon answer, will not prevent the party obtaining it from moving to quash the writ at its return. *Waters vs. Duvall,* - - - - - 76
3. It is error in the county court to submit to the belief of the jury, a question of law, or a mixed question of law and fact. *Plater vs. Scott,* 116
4. A party to the suit has a right to have a jury instructed in reference to their proper sphere of action, and to have them told what was legitimately within their province as the triers of the issues submitted to them; and when a court refuses without qualification to instruct them as to what they may infer from the evidence, (being so required,) it is error. *State use of Barber vs. Hammond's Ex'rs,* - 157
5. A suitor in court is bound to be present in court in person or by attorney, to take care of his rights, and attend to their due prosecution, and cannot make the omission to

- perform this duty, of itself, the foundation of an injunction. *Gott and Wilson vs. Carr*, - - - - 309
6. It is the province of the court to determine the legal effect of contracts. *Hall vs. Hall, et al.* - 336
7. As to mode of challenging and striking jurors in civil cases. *Lee and Peter*, - - - - - 447
- See New Trial.

PRACTICE IN CHANCERY.

1. Regularly an infant's answer by his guardian is not evidence against him, because he is not sworn; and it is only for the purpose of making proper parties. It is not in reality the answer of the infant, but of the guardian only, who is sworn. *Kent's Ad'mrs and Boyle vs. Taneyhill*, - 1
 2. Where an infant is defendant, and it is not expressly provided by law, that his answer by guardian shall be considered an admission of the facts alleged in the bill, it is proper to put the plaintiff to proof of all his material allegations, - - - *Ib.*
 3. Under the act of 1824, ch. 196, a cause may be removed from the equity side of county courts of the sixth judicial district, to the court of Chancery, upon the suggestion of one of the complainants only. *Cox, et al. vs. McCausland's Ad'mrs.* 16
 4. An allegation in a complainant's bill, though not denied, if material to the case, must be proved at the hearing. *Joice and Wife vs. Taylor*, 54
 5. Upon a bill against husband and wife, the wife never having answered, this court upon appeal refused to pass any final decree, but remanded the cause under the act of 1832, ch. 302. *Lyles vs. Hatton*, 122
 6. A mistake in the calculation of interest in the auditor's report, ought regularly, under the act of 1825, to be pointed out to the court by exception, else this court will not notice it on appeal. - - - - *Ib.*
 7. It is error in a decree of the Chancellor not to make a final adjudication upon the whole subject matter before him. *Evans, et al. vs. Iglehart, et al.* - - - - - 171
- See Appeal, 8.
- Court of Chancery, 9 to 15.
- Usury, 3.

PREROGATIVE.

See Priority on payment of debts.

PRESUMPTION.

1. Deeds and patents though directed by law to be recorded within a limited time, and to have no legal effect unless such requisitions are complied with, yet to quiet possession, the court upon a proper foundation being laid for it, will direct the jury to presume the existence of such papers, and that all legal requisitions had been complied with to give them effect. *Burke vs. Negro Joe*, - - - - - 136
2. All cases of presumption may be rebutted or explained, and if the foundation of fact upon which the presumption is claimed does not exist, the presumption must fail. *Ib.*
3. The law construes no act to be tortious but from necessity. - - - *Ib.*

PRINCIPAL AND AGENT.

- A principal is responsible for the negligence or misconduct of his agents or servants, while acting in his employment; and any person who sustains an injury by such negligence or misconduct, may resort to the principal for indemnity and redress. *Steam Navigation Company vs. Hungerford*, - - - - - 291

PRIORITY IN PAYMENT OF DEBTS.

1. The rights conferred by the act of 1650, ch. 23, were granted to the lord proprietary of *Maryland*, personally, and to his heirs, so long only as they should be lords proprietaries of the then province; that act was not in force at the period of the revolution, and the privileges which it originally created did not pass to the State. *State vs. Bank of Maryland*, - - - - - 205
2. The royal prerogative right of preference in the payment of debts is a branch of the common law of *England*, and that common law has been adopted in this State by the general terms of the declaration of rights, and the third article thereof. And this secures to the State the right at common law to have its debt first paid out of the property of its debtor, *remaining in his hands, and no lien standing in the way.* - - - *Ib.*
3. The right of priority of the State is a rule *only* in the distribution of the property of the debtor, requiring the debt due to the State to be first paid, where the individual creditor has no antecedent lien overreaching it. *Ib.*

4. The State of *Maryland's* funds were deposited in a bank under resolutions of the General Assembly, and the bank being in failing circumstances, the president and directors thereof transferred all its property to trustees for the equal benefit of all its creditors. HELD, that the assignment was valid, and that the preference which the State had in the payment of her claim so long as the title to the property remained in the bank was defeated by the deed of trust. - - - - - *Ib.*

PROCEDENDO.

This court does not award a *procedendo* when the judgment of the county court against the plaintiff for a defective declaration upon demurrer, is affirmed. *Kilgour vs. Miles and Goldsmith*, - - - - - 268
See Evidence, 9.

REPLEVIN.

1. The object of the replevin bond is the indemnity of the defendant in replevin, and all questions arising upon it should be determined by a due regard to that consideration. *Doogan vs. Tyson*, - - - - - 453
2. The plaintiff in a replevin bond binds himself to prosecute his suit with effect, and in case the property is adjudged to be restored to the defendant, he is bound to do so or his bond is forfeited. In consequence of the property being restored to him by virtue of the writ of replevin, he assumes upon himself by his bond this legal responsibility. - - - - - *Ib.*
See Pleas and Pleading, 5, 6, 7.

SALES OF REAL ESTATE FOR PAYMENT OF CREDITORS.

See Court of Chancery, 1, 3, 8 to 14, 18, 19, 20, 25.

SHERIFF.

1. Certain personal property was attached by the sheriff under writs from the creditors of M, and no person appearing to defend the suit or make claim, the property was condemned; upon which judgment a *fiery facias* issued, and a sale took place; after which R, who had notice of the service of the attachment, and who, at the time of the attachment, had notified the sheriff of his claim to the property attached, brought an action of trespass against the sheriff, for taking and selling the goods in question, and recovered a verdict co-extensive with his claim.

Upon a case stated, submitting to the court, whether upon the facts agreed on, the plaintiff was entitled to retain the verdict, IT WAS HELD, that he was not entitled to recover against the sheriff both for the attachment and sale. *Ranahan vs. O'Neale, Jr.* - - - - - 298

2. A sheriff is not responsible for an act, as a *tort*, which as a public officer he is bound to perform. In selling property under *fiery facias*, which before had been specifically condemned by a court of competent jurisdiction, the sheriff is not responsible to the party claiming title to the property though no party to the suit, and especially where the plaintiff might have claimed the property before condemnation, and neglected to do so. - - - - - *Ib.*
3. Where a warrant is in due form, and commands a constable to arrest a party to give security for the peace upon complaint made, the officer who executes it, has no reason to inquire into the particulars of the complaint, or whether any were made at all. It is his duty to execute it, and in doing so legally, his justification cannot depend upon the question of whether the oath of the party who applied for it was sufficient to authorise its issue. *Hall vs. Hall, et al.* - - - - - 386
4. A constable, in the execution of a warrant to arrest a party, breaks another's house at his peril. If it shall prove, that the party sought for is *not* in the house, the officer is a trespasser. Even where the right of possession of the occupant in fact is controverted, the officer in such case derives no justification from it. *Ib.*
5. Before an officer, with a warrant to arrest a party, breaks the door of another person in executing his authority, he should for his justification demand entrance, and the previous knowledge of the tenant of the purpose of the officer in coming to the premises, does not dispense with this demand. - - - - - *Ib.*
6. The law anxiously regards the security of a ministerial officer in serving process directed to him by a competent jurisdiction: And it may happen that a magistrate issuing a warrant, may act illegally, and subject himself to an action or prosecution, while the constable will be justified. - - - - - *Ib.*
7. So where a magistrate issues a warrant to one officer, who executes

and returns it, and produces the body of the party who is recognised or discharged, and before the return day the magistrate directs the same warrant to another officer *who without knowledge of the previous arrest*, again arrests the party, he would be justified, although the magistrate's conduct would be illegal. - - *Ib.*

SLANDER.

1. Words, when used in a manner and sense to impute guilt, imply in contemplation of law, malice sufficient to sustain an action, and entitle the plaintiff to a verdict; but the amount of damages depends in part on the degree of malice, of the malignity and wantonness of intention to injure, with which the words used were spoken. *Rigden vs. Wolcott*, 413
2. It is not necessary in an action of slander for the defendant to give notice of his intention to offer evidence in mitigation of damages under the general issue. - - - *Ib.*
See Evidence, 14.

SLAVES.

See Negroes and slaves.

SMALL DEBTS.

Under the act of 1791, ch. 68, sec. 4, upon the trial of appeals from the judgments of magistrates, the county courts do not act purely as courts of law, but according to the equity and right of the matter, and hence will inquire into the want of consideration in a single bill, if that be insisted upon as a defence to a suit, originating before a justice of the peace. *Gott and Wilson vs. Carr*, 309

SPECIFIC EXECUTION.

See Court of Chancery, 42, 43.

STATE.

See Priority on payment of debts.

STATUTE OF FRAUDS.

See Indemnity, 2.

— Court of Chancery, 45.

— Contract, 3.

SUBSTITUTION.

See Executor and Administrator, 1.

— Court of Chancery, 18.

SUNDAY.

The "Sabbath," "the Lord's day," and "Sunday," mean the same day in all Christian communities, and

includes the twenty-four hours next ensuing the midnight of Saturday. *Kilgour vs. Miles and Goldsmith*, 268
See Contract, 1.

SURETY.

1. A mere forbearance to sue the principal debtor is no discharge of his surety. *Jordan vs. Trumbo*, - 103
2. The entry of a stay of execution on a judgment against a principal debtor, without the knowledge and consent of a surety is a discharge of the surety; or if done after the death of the surety, without the knowledge and consent of his executors, is a discharge of them. *State use of Barber vs. Hammond*, - - - 157
3. A creditor by making a new agreement with his debtor, inconsistent with the terms of the original agreement, or any alteration in those terms, or in the mode or the time of performing them, without the assent of the surety of such debtor, thereby discharges the surety. *Sasscer vs. Young and Kemp*, - - - 243
4. A creditor may forbear during his pleasure the rigorous prosecution of his demand, and may accordingly remain inactive, reposing upon the faith of the security he has taken. *Ib.*
5. A security who has become chargeable by a forfeiture of a contract, or its non-performance by the principal, in the manner, and at the time agreed upon, may insure a prompt prosecution, either by discharging the obligation, or becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed by an application to a court of equity. *Ib.*
6. Upon a bill filed by one joint surety against another for contribution, where the principal obligor and the other sureties are insolvent, it is unnecessary to make them parties for the purpose of contribution. *Byers vs. McLanahan, Jr.* - 250
7. Where the defendant becomes joint security with the complainant, at the request of the latter, he is absolved from all responsibility to make contribution in his character of co-security. - - - - - *Ib.*

TRANSITORY ACTION.

See Jurisdiction, 2.

TRESPASS.

Trespass will not lie by mortgagor against mortgagee, for taking possession of mortgaged chattels before

the time of forfeiture, when the mortgage contained no stipulation that the property should remain with the mortgagor until forfeiture. *Jamieson vs. Bruce*, - - - 72

TRUSTEE.

A trustee appointed by Chancery may appeal from orders passed against him affecting the funds in his hands. *E. T. and A. Ellicott vs. T. Ellicott*, 35

See Court of Chancery, 15, 16, 18.

USURY.

1. Where all usurious contracts are declared by law to be null and void, there can be no recovery either at law or in equity, in a suit instituted upon an instrument infected with usury, if the defence of usury be pleaded; the very instrument that is sought to be enforced being null and void. *Trumbo, Ex'r of Neff vs. Blizzard and Jacobs*, - - - 18
2. When a mortgage is given on an usurious consideration, the plea of usury either by the mortgagor or his alienee, is a full defence to a bill for a foreclosure by the mortgagee. *Ib.*
3. But there is a recognized distinction between that and the case of a mortgagor who goes into Chancery, seeking relief against the mortgage on the ground of usury, which will only be extended to him on his paying, or offering to pay, the principal and legal interest of the sum due, and this on the principle, that he who seeks equity, to obtain relief, must do equity. - - - - *Ib.*

See Court of Chancery, 23.

— Evidence, 7.

VENDOR AND VENDEE.

Where a vendor of chattels accepts from the vendee the single bill of a third person on account of his purchase money, he is bound to use active diligence in pursuing the obligor for a recovery of the sum due on the bill, so that nothing should be lost by the laches of the vendor. *Crawford vs. Berry*, - - - - 63

VOTING STOCK IN CORPORATIONS.

See Court of Chancery, 21.

WASTE.

See Jurisdiction, 2.

WILLS AND TESTAMENTS.

1. S bequeathed all his real estate to his wife for life, and then devised

as follows, "After her death, I will the tract of land H, together with all the personal property which may belong thereto at her death, to E and her heirs forever. Item, I give to my wife for life, all my personal property not herein before disposed of, together with all the money of which I may die possessed; after her death I give the one half part of all my said personal property to the children of J, C and B, to be equally divided among them; and the same shall be divided immediately, or in a convenient time after the death of my said wife; the other half shall go to, and be vested in whomsoever my wife shall by last will direct. The widow appointed E to take under her power over the moiety of the personal property after her death. Some of the residuary legatees in remainder of S, filed a bill against the executors of S and his wife, and E the devisee of his wife for an account and distribution of S's personal estate among the parties entitled. Upon the construction of the will IT WAS HELD.

1. That the mere fact of giving the personal estate or the residue thereof, to one for life, with remainder over to another, does not of itself destroy the right of the legatee for life, under our testamentary system, to the enjoyment of the property specifically.

2. That the intention of the testator ought to prevail, and in ascertaining that, the court will presume he had a knowledge of the testamentary law of Maryland, and the usages under it, and that he made his will in reference thereto, intending its execution accordingly.

3. That the testator when he gave all his real and personal estate to his wife for life, did not intend that his executors should sell his personalty, and invest the same, and pay her its annual income for life.

4. That the limitation over to E of all the personal property that might belong to the tract of land H at the death of the testator's widow, is conclusive evidence that the testator did not intend that the general residue of his estate should be sold and invested.

5. When a surplus or residue bequeathed for life with remainder over, consists of money, or property whose use is the conversion into money, and which it could not for that reason be intended should be

specifically enjoyed, nor consumed in the use—as a crop of tobacco or the like, an investment thereof must be made by the executor in some safe and productive fund; and most properly under the direction of the courts, so as to secure the dividends to the legatee for life, and the principal after his death, to the legatee in remainder.

6th. When any article of personalty, of such a nature *that its use is its consumption*, is specifically given to a legatee for life, with remainder over, the legatee for life takes the absolute property in the thing bequeathed, and the same rule applies when the consumable articles are comprised in the bequest of a general residue.

7th. That the wife of the testator S had no interest in the property devised by him except during her life. Upon her death one half of the balance of the personal property vested in the appointees named in her will, and the other moiety in the legatees in remainder designated in the will of S. The executor of the wife of S had no right to any portion of the property.

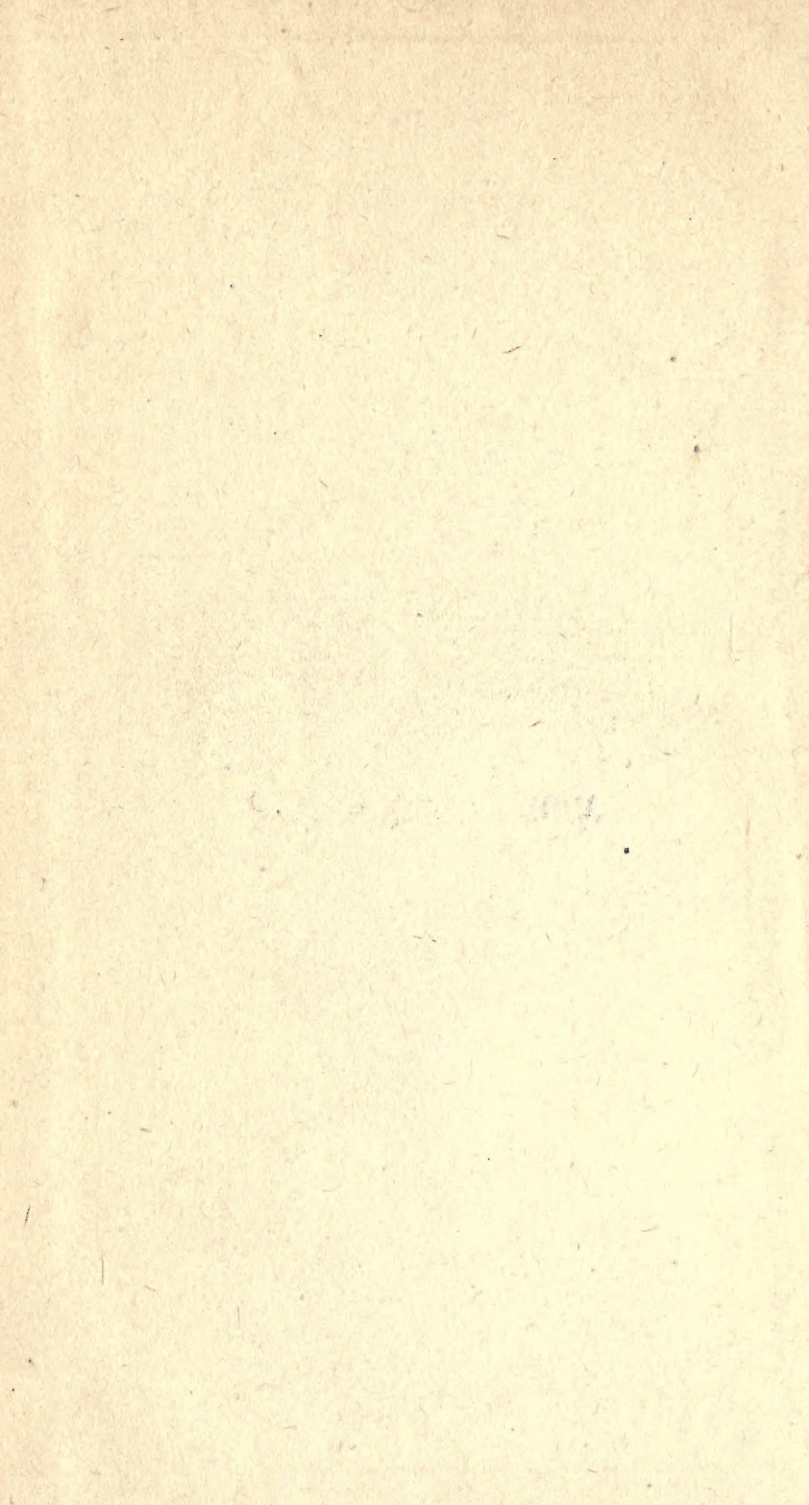
8th. A life estate in a chattel may be granted for life to one person, and the same, with *its issue or increase*, limited over to another; but this cannot be done but by express words or necessary implication. Applying this rule to the devisee of the personal property belonging to the tract called H, to E upon the death of the testator's widow, the *increase* thereof which became absolutely the property of the widow under the devise to her, did not pass to E. The testator only meant to devise what belonged to himself. *Evans, et al. vs. Iglehart, Jr. et al.* - 171

2. A by her will devised as follows: "I give unto my nephew J, my slave *Samuel*; in case the said J should die without lawful heir of his body, I then give the said slave *Samuel* to my nephew T." HELD, that this limitation over to T, being of a *man* slave, was not too remote,

and therefore not void. *Biscoe vs. Biscoe*, - - - - - 232

3. In relation to executory bequests of personal property dependent upon a dying without lawful heir, or leaving issue, &c., the language of the will may be restricted to mean a dying without issue living at the death of the first taker or another person *in esse*, by any clause or circumstance in the will, that can indicate such intention in the testator; and in order to support the limitation over, the courts, in such cases, generally incline to lay hold on any expression or circumstance in the will, that seems to afford a ground for such a construction. - - *Ib.*
4. So when the subject of the bequest was *a negro man*, a life in being, and the limitation over could never by possibility take effect, but in his life-time, as the term of the servitude must expire with his life, this was held to be a circumstance indicating the intent of the testator, which would qualify a limitation over, otherwise too remote, and void upon general principles. *Ib.*
5. By the will of W, the remainder of his real estate was devised to a residuary legatee, and his executors were directed to sell such parts of his real and personal estate as they might think proper and necessary, for the payment of debts and legacies. Under this will the executors possess only a naked power to sell, and until the exercise of that power, the estate passed in fee simple to the devisee, who *only* was authorized to receive the rents and profits. An order of the court of Chancery to sell the real property founded upon an allegation of the inadequacy of the personal estate to pay debts and legacies, without any reference to the rents and profits of the property ordered to be sold as necessary to pay debts or legacies, *held* not to affect the devisee's right to them. *Guyer vs. Maynard, Ex'r of Neth.* - - 420
- See Court of Chancery, 28, 29, 53.
- Executor and Administrator, 14.
- Legacy, 1, 2.





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